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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

OCTOBER 26, 2020

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APPEAL AND ERROR

Notice of appeal—designation of both interlocutory order and final order—dismissal—The Court of Appeals dismissed an appeal in a civil case for lack of jurisdiction where plaintiff purported to appeal from an interlocutory order denying his motion to amend but failed to designate the final order in his notice of appeal. To properly appeal the interlocutory order, plaintiff should have designated in his notice of appeal both the interlocutory order and the final order rendering the interlocutory order reviewable. The jurisdictional deficiency required dismissal where it could not be fairly inferred from the notice of appeal that plaintiff also intended to appeal from the final order. **Manley v. Maple Grove Nursing Home, 37.**

Preservation of issues—breach of guaranty agreement—piercing the corporate veil—not pleaded in complaint—In a dispute between a guarantor and the purchaser of a promissory note, the guarantor's argument that the third-party entity which purchased the note was a mere instrumentality of another individual guarantor was not preserved for appellate review where it was not pleaded in the complaint. **Bethesda Rd. Partners, LLC v. Strachan, 1.**

Preservation of issues—insufficient evidence—not raised in trial court— Defendant failed to preserve for appellate review an argument that the State lacked evidence of "identifying information" in a prosecution for identity theft because he did not raise the issue in the trial court. **State v. Miles, 78.**

ASSIGNMENTS

Validity—guaranty contract—individual guarantor-turned-purchaser—exceptions inapplicable—Where one member from a group of individual guarantors of a promissory note formed a third-party entity to purchase the note from the lender after default, the purchase constituted a valid assignment and not an extinguishment of debt—there was no evidence that the parties intended for the debt to be discharged, or that the assignment was prohibited by statute, public policy, or any other exception existing under contract law. **Bethesda Rd. Partners, LLC v. Strachan, 1.**

CHILD CUSTODY AND SUPPORT

Modification—existing order—requiring a different parent to pay support— The trial court did not err by exercising jurisdiction over a child support dispute where the trial court's order was a modification of an existing child support order, rather than an establishment of a new one. A child support order is not confined to the obligations of one specific parent, so the new order requiring plaintiff to make child support payments modified the existing order that required defendant to make child support payments. **Watkins v. Benjamin, 122.**

CONSPIRACY

To commit robbery with a dangerous weapon—agreement—attempted taking—threat—sufficiency of evidence—The State presented sufficient evidence that defendant and at least four other people had a mutual agreement and intent to rob the victim at gunpoint outside of his house. After two carloads of participants met at a nearby parking lot, one car driven by a female drove into the victim's driveway and honked the car horn to get the victim to come outside, at which point defendant approached the victim from behind as the victim was retrieving his phone from his car, raised a loaded gun, and threatened the victim not to move. **State v. Miles, 78.**

CONTRACTS

Validity—promissory note—executed by beneficiaries of estate—in favor of executrix—fiduciary duty—There was a genuine issue of material fact as to the validity of a promissory note that made defendants (beneficiaries of an estate) liable to plaintiff (executrix of the estate) for $15,000 "for value received" where the parties filed contradictory affidavits regarding defendants' allegations that plaintiff said she would not allow an in-kind conveyance of real property in place of the will's contemplated sale of the property unless defendants executed the promissory note in her favor. If the factfinder were convinced that plaintiff demanded the promissory note in exchange for an agreement to perform her duties as executrix, the note could be set aside for plaintiff's breach of her fiduciary duty to the beneficiaries of the estate. **Voliva v. Dudley, 116.**

CRIMINAL LAW

Right to jury trial—waiver—prejudice—Even assuming the trial court erred by allowing defendant to waive his right to a jury trial, defendant could not show prejudice where he chose to wait until the day of trial to give his intent to waive his right and there was no indication that a jury would have been privy to exculpatory evidence that the trial court did not consider. **State v. Rutledge, 91.**

CRIMINAL LAW—Continued

Right to jury trial—waiver—right to revoke waiver within 10 business days—waiver on day of trial—The Court of Appeals rejected defendant's argument that the trial court was required to provide him with a 10-day "cooling-off" revocation period before starting trial where defendant waived his right to a jury trial on the first day of trial. A plain reading of N.C.G.S. § 15A-1201(e) did not compel such a rule, which would effectively allow criminal defendants to force a mandatory 10-day continuance. **State v. Rutledge, 91.**

Right to jury trial—waiver—statutory notice—notice of intent and request for arraignment on the day of trial—The trial court did not err by allowing defendant to waive his right to a jury trial where defendant gave notice of his intent to waive a jury trial on the day of the trial, the trial court and the State both consented to the waiver, and defendant invited noncompliance with the timeline requirements of N.C.G.S. § 15A-1201(c) by his own failure to request a separate arraignment prior to the date of the trial. **State v. Rutledge, 91.**

Right to jury trial—waiver—trial court's colloquy with defendant—statutory requirements—The trial court did not err by allowing defendant to waive his right to a jury trial where the trial court complied with N.C.G.S. § 15A-1201(d)(1) by addressing defendant personally—explaining the consequences of waiving a jury trial and asking whether defendant had discussed his rights and the consequences of waiving them with his attorney. Contrary to defendant's argument on appeal, the trial court was not required to ask defendant whether he was literate, whether he was satisfied with his lawyer's work, or whether anyone had made promises or threats to induce him to waive a jury trial. **State v. Rutledge, 91.**

DAMAGES AND REMEDIES

Doctrine of equitable contribution—valid assignment of guaranty—remedy at law available—In a dispute between a guarantor and the purchaser of a promissory note, the trial court erred in applying the doctrine of equitable contribution to reduce the guarantor's liability by half—where the purchase of the note was a valid assignment under contract law and an adequate remedy at law was available, there was no need to adopt an equitable remedy. **Bethesda Rd. Partners, LLC v. Strachan, 1.**

Limitation of recovery—half the price of note purchased—not face value—abuse of discretion—In a dispute between a guarantor and the purchaser of a promissory note, the trial court abused its discretion in limiting damages by the entity to half of the price paid to purchase the note, rather than the note's face value, since the purchase of the note was a valid assignment under contract law and not a discharge of any debt. **Bethesda Rd. Partners, LLC v. Strachan, 1.**

EQUITY

Defenses—waiver—equitable remedy not available—mootness—In a dispute between a guarantor and the purchaser of a promissory note, where the remedy of equitable contribution was not available, the purchaser's argument on appeal that the guarantor had not waived defenses based on that remedy was dismissed as moot. **Bethesda Rd. Partners, LLC v. Strachan, 1.**

EVIDENCE

Witness opinion testimony—law enforcement officer—modus operandi of the crime—conspiracy to commit robbery with a dangerous weapon—In a prosecution for conspiracy to commit robbery with a dangerous weapon, no plain error occurred from the admission of a law enforcement officer's testimony regarding the modus operandi behind the series of events at issue—which included a female driver pulling into the victim's driveway, honking to lure the victim outside, and then defendant approaching the victim from behind and threatening him at gunpoint—and their similarity to other incidents in the same geographic area, since the officer never stated it was his opinion that the suspects were guilty of conspiracy, and the State presented substantial evidence of each element of the crime. **State v. Miles, 78.**

FIDUCIARY RELATIONSHIP

Breach of duty—limited liability company—member manager—no duty to fellow members—Where one member from a group of individual guarantors of a promissory note (all members of a limited liability company (LLC)) formed a third-party entity to purchase the note from the lender after default, a co-guarantor's claim of breach of fiduciary duty against the guarantor who set up the purchasing entity (who was also the sole member manager of the LLC) could not succeed since any fiduciary duty owed was to the limited liability company and not to the other members. **Bethesda Rd. Partners, LLC v. Strachan, 1.**

FRAUD

Constructive—elements—fiduciary duty and breach—Where one member from a group of individual guarantors of a promissory note formed a third-party entity to purchase the note from the lender after default, a co-guarantor's claim of constructive fraud against the guarantor who set up the purchasing entity failed where the co-guarantor could not demonstrate that he was owed a fiduciary duty or that any duty was breached. **Bethesda Rd. Partners, LLC v. Strachan, 1.**

GUARANTY

Breach—purchase of note—discharge of liability—mere instrumentality—In a dispute between a guarantor and the third-party entity (set up by a second guarantor) that purchased a promissory note, the second guarantor was not precluded from bringing breach of contract claims against his co-guarantors through the entity, because the first guarantor's argument that the purchase was actually a discharge of debt—based on the claim that the entity was a mere instrumentality of the second guarantor—had no merit. **Bethesda Rd. Partners, LLC v. Strachan, 1.**

IDENTITY THEFT

Jury instructions—"identifying information"—section 14-113.20—nonexclusive list—In an identity theft case, the trial court properly instructed the jury regarding "identifying information" where it accurately based its instruction on N.C.G.S. § 14-113.20 (defining identity theft) and used nearly verbatim language from the N.C. Pattern Jury Instructions. The Court of Appeals rejected defendant's argument that the statutory list of identifying information was exclusive—therefore, although the statute did not include another person's name, date of birth, and address, where defendant used those pieces of information to present himself as

IDENTITY THEFT—Continued

someone else in order to avoid legal consequences, his actions were covered under the statute. **State v. Miles, 78.**

JUVENILES

Delinquency—admission of guilt—factual basis—sufficiency—In a juvenile delinquency case, the trial court erred by accepting defendant's admission of guilt to attempted larceny where it failed to find a sufficient factual basis to support the admission, as required by N.C.G.S. § 7B-2407(c), since the State failed to present evidence that defendant intended to steal someone else's bicycle or assist others in stealing it. **In re J.D., 11.**

Delinquency—disposition—higher level imposed—findings of fact—absent— Where the trial court adjudicated defendant a delinquent juvenile for committing two sexual offenses, the court erred by entering a level 3 disposition against him and committing him to a youth detention center where a court counselor recommended a level 2 disposition based on a report showing, among other things, that defendant's risk factors for engaging in future sexually harmful behaviors were in the "low to low moderate" range. The trial court failed to enter written findings explaining why it ignored the counselor's recommendations, nor did the court enter adequate findings required by N.C.G.S. § 7B-2501(c) to support a level 3 disposition. **In re J.D., 11.**

Delinquency—disposition—indefinite commitment to youth detention center—compelling reasons—At the disposition phase of a juvenile delinquency case, the trial court erred by indefinitely committing defendant to a youth detention center without entering written findings stating "compelling reasons" for the confinement, as required by N.C.G.S. § 7B-2605. Although some of the court's findings listed reasons supporting its disposition, the court phrased those reasons as contentions made by defense counsel and the State rather than as ultimate facts. **In re J.D., 11.**

Delinquency—right to confrontation—statutory mandate—prejudice—In a juvenile delinquency case—where defendant forcibly placed his private parts on the minor victim's bare buttocks during a sleepover, one of his cousins filmed the event, and the video was posted on social media—the trial court violated the statutory mandate in N.C.G.S. § 7B-2405 to protect defendant's constitutional right to confront witnesses by admitting his two cousins' out-of-court statements. Where the remaining evidence at trial—including the victim's testimony—indicated that no anal penetration took place that night, admission of the cousins' statements prejudiced defendant because his cousins said they thought he and the victim did have anal sex. **In re J.D., 11.**

MOTOR VEHICLES

Insurance—underinsured motorist coverage—multiple claimants—per-accident cap—Plaintiff-insurer was liable to pay defendants (a husband and his deceased wife, who was the named insured of a personal automobile policy issued by plaintiff) pursuant to the per-accident cap in their insurance agreement where the parties stipulated that underinsured motorist (UIM) coverage was available to defendants, there were two claimants (defendants) seeking coverage under the UIM policy, and the negligent driver's liability policy was exhausted pursuant to a per-accident cap. **N.C. Farm Bureau Mut. Ins. Co., Inc. v. Dana, 42.**

PARTIES

Motion to join—undue delay—trial court's discretion to grant—In a dispute between a guarantor and a third-party entity set up by a second guarantor for the purpose of purchasing a promissory note, the trial court did not abuse its discretion in denying a motion to join as a party the limited liability company in which both guarantors were members, where the motion was filed years after counterclaims were asserted and more than a month after an order of summary judgment disposed of the case. **Bethesda Rd. Partners, LLC v. Strachan, 1.**

SATELLITE-BASED MONITORING

Lifetime—reasonableness—risk of recidivism—efficacy—evidence required— The trial court's order imposing lifetime satellite-based monitoring (SBM) was reversed where the State provided no evidence about defendant's risk of recidivism or the efficacy of SBM to accomplish reducing that risk that would support a reasonableness determination as applied to defendant. The State's contention that the trial court took judicial notice of the studies and statistics cited during argument was not supported by the record—the studies were not presented as evidence, the State did not request judicial notice, and the court did not indicate it was taking judicial notice. **State v. Anthony, 45.**

SEARCH AND SEIZURE

Search warrant application—affidavit—probable cause—nexus between location and illegal activity—In a prosecution for drug trafficking, defendant was not entitled to the suppression of cocaine and drug paraphernalia found at an apartment where facts in the affidavit submitted with the search warrant application, along with inferences that could reasonably be drawn from those facts, indicated a fair probability that evidence of an illegal drug transaction would be found at that location. Although the drug transaction was observed elsewhere, law enforcement followed a vehicle occupied by known drug dealers directly back to the apartment from the place of the drug exchange, thereby providing a direct connection between the apartment and the illegal activity, and a substantial basis from which to make a probable cause determination. **State v. Bailey, 53.**

Suspicionless seizure—incident to execution of a search warrant—"occupant" of searched premises—In a prosecution for various drug possession charges, where a team of officers detained defendant while executing a warrant to search his girlfriend's apartment, the trial court erred by denying defendant's motion to suppress evidence recovered from his nearby vehicle because—assuming a Fourth Amendment seizure did occur when the officers retained defendant's driver's license—a suspicionless seizure incident to the warrant's execution was unjustified because defendant was not an "occupant" of the searched premises. Although defendant and his vehicle were physically close to the apartment, defendant cooperated with police questioning, never attempted to approach the apartment, and otherwise did nothing to interfere with the officers' search. **State v. Thompson, 101.**

Traffic stop—reasonable suspicion—profane hand gesture made from a vehicle—Where a trooper conducted a traffic stop after seeing defendant make a profane hand gesture from the passenger seat of a moving car, the trial court properly denied defendant's motion to suppress the trooper's testimony because a reasonable suspicion of criminal activity justified the stop. Although a profane gesture directed toward the trooper would have amounted to constitutionally protected speech, it

was unclear to the trooper whether defendant was gesturing to him or to another motorist (in which case, defendant's conduct could have amounted to the crime of "disorderly conduct"). **State v. Ellis, 65.**

SENTENCING

Prior record level—calculation—stipulation—based on error—not binding— In a prosecution for resisting, delaying, and/or obstructing a public officer during a traffic stop, the trial court erred in sentencing defendant as a Level III offender where the parties mistakenly stipulated that one of defendant's prior convictions—which the trial court factored into its prior record level calculation—was a misdemeanor when in fact it was an infraction, which could not be counted as one of the five prior convictions required for a prior record level of III. The parties' stipulation was not binding on the court because it was based on a mistake of law. **State v. Ellis, 65.**

SEXUAL OFFENSES

Forcible sexual offense—"sexual act"—sufficiency of evidence—juvenile delinquency—In a juvenile delinquency case—where defendant forcibly placed his private parts on the minor victim's bare buttocks during a sleepover, his cousin filmed the event, and the video was posted on social media—the trial court erred by denying defendant's motion to dismiss a charge of first-degree forcible sexual offense where the State presented insufficient evidence that defendant engaged in a "sexual act," as defined by N.C.G.S. § 14-27.20(4), with the victim. Specifically, the State could not prove that anal intercourse occurred where the victim testified that there was no penetration during the incident. **In re J.D., 11.**

Sexual exploitation of a minor—acting in concert—sufficiency of evidence—juvenile delinquency—In a juvenile delinquency case—where defendant forcibly placed his private parts on the minor victim's bare buttocks during a sleepover, his cousin filmed the event, and the video was posted on social media—there was insufficient evidence to convict defendant of second-degree sexual exploitation of a minor. Although the State argued that defendant and his cousin were acting in concert regarding the filming of the incident, the video showed defendant did not want to be filmed and explicitly asked his cousin to stop recording him. Moreover, there was no evidence that defendant was the one who distributed the video. **In re J.D., 11.**

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BETHESDA ROAD PARTNERS, LLC, PLAINTIFF
v.
STEPHEN M. STRACHAN AND WIFE, DEBORA L. STRACHAN, DEFENDANTS

STEPHEN M. STRACHAN AND DEBORA L. STRACHAN, THIRD-PARTY PLAINTIFFS
v.
GEORGE C. MCKEE, JR. AND WIFE, ADRIANNE S. MCKEE, THIRD-PARTY DEFENDANTS

No. COA18-1170

Filed 20 August 2019

1. Assignments—validity—guaranty contract—individual guarantor-turned-purchaser—exceptions inapplicable

Where one member from a group of individual guarantors of a promissory note formed a third-party entity to purchase the note from the lender after default, the purchase constituted a valid assignment and not an extinguishment of debt—there was no evidence that the parties intended for the debt to be discharged, or that the assignment was prohibited by statute, public policy, or any other exception existing under contract law.

2. Appeal and Error—preservation of issues—breach of guaranty agreement—piercing the corporate veil—not pleaded in complaint

In a dispute between a guarantor and the purchaser of a promissory note, the guarantor's argument that the third-party entity which purchased the note was a mere instrumentality of another individual guarantor was not preserved for appellate review where it was not pleaded in the complaint.

3. Guaranty—breach—purchase of note—discharge of liability—mere instrumentality

In a dispute between a guarantor and the third-party entity (set up by a second guarantor) that purchased a promissory note, the second guarantor was not precluded from bringing breach of contract claims against his co-guarantors through the entity, because the first guarantor's argument that the purchase was actually a discharge of debt—based on the claim that the entity was a mere instrumentality of the second guarantor—had no merit.

4. Fiduciary Relationship—breach of duty—limited liability company—member manager—no duty to fellow members

Where one member from a group of individual guarantors of a promissory note (all members of a limited liability company (LLC)) formed a third-party entity to purchase the note from the lender after default, a co-guarantor's claim of breach of fiduciary duty against the guarantor who set up the purchasing entity (who was also the sole member manager of the LLC) could not succeed since any fiduciary duty owed was to the limited liability company and not to the other members.

5. Fraud—constructive—elements—fiduciary duty and breach

Where one member from a group of individual guarantors of a promissory note formed a third-party entity to purchase the note from the lender after default, a co-guarantor's claim of constructive fraud against the guarantor who set up the purchasing entity failed where the co-guarantor could not demonstrate that he was owed a fiduciary duty or that any duty was breached.

6. Parties—motion to join—undue delay—trial court's discretion to grant

In a dispute between a guarantor and a third-party entity set up by a second guarantor for the purpose of purchasing a promissory note, the trial court did not abuse its discretion in denying a motion to join as a party the limited liability company in which both guarantors were members, where the motion was filed years after counterclaims were asserted and more than a month after an order of summary judgment disposed of the case.

7. Damages and Remedies—limitation of recovery—half the price of note purchased—not face value—abuse of discretion

In a dispute between a guarantor and the purchaser of a promissory note, the trial court abused its discretion in limiting damages

by the entity to half of the price paid to purchase the note, rather than the note's face value, since the purchase of the note was a valid assignment under contract law and not a discharge of any debt.

8. Damages and Remedies—doctrine of equitable contribution—valid assignment of guaranty—remedy at law available

In a dispute between a guarantor and the purchaser of a promissory note, the trial court erred in applying the doctrine of equitable contribution to reduce the guarantor's liability by half—where the purchase of the note was a valid assignment under contract law and an adequate remedy at law was available, there was no need to adopt an equitable remedy.

9. Equity—defenses—waiver—equitable remedy not available—mootness

In a dispute between a guarantor and the purchaser of a promissory note, where the remedy of equitable contribution was not available, the purchaser's argument on appeal that the guarantor had not waived defenses based on that remedy was dismissed as moot.

Appeal by plaintiff and third-party defendant, Bethesda Road Partners, LLC, from Judgment entered 26 February 2018, and by defendant and third-party plaintiff Stephen M. Strachan from Order entered 6 June 2017 and Order and Judgment entered 26 February 2018, by Judge John O. Craig, III, in Iredell County Superior Court. Heard in the Court of Appeals 5 June 2019.

Carruthers & Roth, P.A., by J. Patrick Haywood and Rachel Scott Decker, for plaintiff and third-party defendants.

Moore & Van Allen PLLC, by Nathan A. White and Mark A. Nebrig, for defendants and third-party plaintiffs.

YOUNG, Judge.

This appeal arises from a dispute between a guarantor of a promissory note and a third party entity, formed by another guarantor, which purchased the note. The trial court did not err in granting the note holder's Motions for Summary Judgment on its breach of guaranty claims against the guarantor where there were no issues of material fact. The guarantor did not preserve a piercing the corporate veil argument, and thus, we dismiss that argument. The trial court did not err in denying the guarantor's Motion to Join a limited liability company whose debt

was secured by his guaranty. The trial court did err in holding that the note holder was only entitled to recover half of the price of the guaranteed note. The trial court did err in applying the Doctrine of Equitable Contribution. Since Equitable Contribution is not an available remedy, we dismiss the argument that the defense was waived. We therefore affirm in part, reverse in part, dismiss in part and remand.

I. Factual and Procedural History

On 31 July 2007, George C. McKee, Jr. ("McKee"), Stephen M. Strachan ("Strachan"), William Allen ("Allen"), and Timothy Bruin ("Bruin") created ABMS Development, LLC ("ABMS") as a real estate venture. McKee was the sole member manager of ABMS, controlled all the books and records, and made all strategic decisions for ABMS. On 28 February 2008, ABMS executed a promissory note ("Note") to CommunityOne Bank ("C1 Bank") as a part of a project. C1 Bank required each ABMS member and his spouse to execute personal guaranties. The project failed, the Note matured, and ABMS defaulted on its obligations.

An attorney for ABMS ("ABMS Attorney") entered into negotiations with C1 Bank on a resolution. The bank said it would not sell the Note to any ABMS members/co-guarantors. ABMS Attorney communicated to C1 Bank that "a different buyer" may be interested in the purchase. ABMS Attorney told bank that "[t]he buyer is not ABMS and the potential investor LLC owners are different than the owners of ABMS." ABMS Attorney confirmed that ABMS and the guarantors would still be liable on the Note.

McKee, the sole member manager of ABMS, formed Bethesda for the sole purpose of purchasing the Note. At the time of purchase, Adrianne S. McKee, McKee's wife ("Mrs. McKee"), was the sole member manager of Bethesda, so it did not appear to have a direct connection to ABMS. However, shortly after closing, McKee was added as a member manager. While Bethesda held the Note, McKee, as managing member of ABMS, made no effort to pay down the debt.

In July 2014, Bethesda then commenced an action against Strachan, Allen, Bruin, and their spouses ("Defendants"), seeking damages under the Note for breach of guaranty agreements. In September 2014, Defendants denied the allegations and asserted claims against Bethesda and the McKees alleging violations of the Equal Credit Opportunity Act ("ECOA"), breach of fiduciary duty, constructive fraud, and violation of Chapter 75 of the North Carolina General Statutes. Bethesda and the McKees, as third-party defendants, denied those allegations and asserted claims against Strachan for breach of contract and unjust enrichment.

Allen, Bruin, and their spouses reached a settlement with Bethesda and were voluntarily dismissed with prejudice. Strachan and Appellees filed cross-motions for summary judgment. The trial court entered an order of summary judgment on 6 June 2017 in favor of Bethesda. In August 2017, Strachan filed a Motion to Join ABMS as a party, which the trial court denied. The trial court entered a final judgment on 26 February 2018. Strachan gave timely notice of appeal on 27 March 2018. Appellees timely cross-appealed on 2 April 2018. Both appeals are now before this Court.

II. Summary Judgment

A. Standard of Review

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

B. Analysis

a. Liability Discharged

[1] In his first argument, Strachan contends that the trial court erred in granting summary judgment in favor of Bethesda. We disagree.

The North Carolina Supreme Court has stated that

> rights under a special guaranty–that is, a guaranty addressed to a specific entity–are assignable unless: assignment is prohibited by statute, public policy, or the terms of the guaranty; assignment would materially alter the guarantor's risks, burdens, or duties; or the guarantor executed the contract because of personal confidence in the obligee. This rule is consistent with the common law of contracts, accommodates modern business practices, and fulfills the intent of the parties to ordinary business agreements.

Self-Help Ventures Fund v. Custom Finish, LLC, 199 N.C. App. 743, 749, 682 S.E.2d 746, 750 (2009) (quoting *Kraft Foodservice, Inc. v. Hardee*, 340 N.C. 344, 348, 457 S.E.2d 596, 598-99 (1995)).

In *Self-Help Ventures Fund*, a lender made a loan which was guaranteed by the guarantors. The note and guaranties were assigned to a government agency, which in turn assigned the note to the creditor,

although the agency did not execute a separate reassignment of the guaranties. When the debtor defaulted on the note, the creditor sued the guarantors and obtained entry of default. The guarantors moved to set aside the default, but this Court held that the defendants did not provide legal support for the contention that the guaranties did not follow the note. The defendants asserted that the guaranties were not assigned, but did not provide evidence showing that the guaranties would "(1) violate a statute, public policy, or the terms of the Guaranties; (2) materially alter defendants' risks, burdens, or duties; or (3) violate personal confidence defendants placed in the obligee." *Id.* In *Self-Help*, this Court also held that upon the note's assignment to the plaintiff, the defendants "unconditionally guaranteed payment to plaintiff, whereupon plaintiff became a party in interest, as set forth in Rule 17(a) of the North Carolina Rules of Civil Procedure." *Id.* at 750, 682 S.E.2d at 751; N.C.R. Civ. P. 17.

Similarly, in *Gillespie*, this Court held that guaranty contracts may be assigned to a guarantor. *Gillespie v. De Witt*, 53 N.C. App. 252, 262, 280 S.E.2d 736, 743 (1981). A plaintiff guarantor took assignment of a note and guaranty from the bank assignor by providing plaintiff's own note in the full amount of the debt. *Id.* at 262, 280 S.E.2d at 743-44. This Court further held that in light of the written agreement, the plaintiff and the bank intended an assignment, not an extinguishment of debt. *Id.* If the parties had intended an extinguishment of debt, this Court reasoned, the parties would have cancelled or destroyed the documents. *Id.* at 262-63.

Here, McKee was a guarantor of the Note between ABMS and C1 Bank. Bethesda, a separate entity, purchased the Note from C1 Bank. At the time of purchase the guaranties were not cancelled or destroyed, nor was there any other evidence of intent to discharge the debt. There was also no evidence that the assignment would have been prevented by any of the exceptions provided in *Self-Help*. Therefore, this was a valid assignment based in contract law. The trial court did not err in granting summary judgment in favor of Bethesda.

b. Mere Instrumentality

[2] In his next argument, Strachan contends that the trial court erred in failing to conclude that the undisputed facts demonstrated Bethesda was a mere instrumentality of McKee, and therefore, the trial court failed to hold that McKee was the actual "purchaser" of a liability that caused him to be both creditor and debtor. We disagree.

To preserve an issue for appellate review, a party must present to the trial court a timely request, objection, or motion, stating the specific

grounds for the ruling the party desired the court to make, and the complaining party must obtain a ruling upon the party's request, objection, or motion. N.C.R. App. P. 10(a)(1). A party cannot raise on appeal issues which were not pleaded or raised below. *Whichard v. Oliver*, 56 N.C. App. 219, 224, 287 S.E.2d 461, 463 (1982).

Strachan failed to plead a piercing the corporate veil claim in his complaint. The trial court granted summary judgment in favor of Bethesda, regarding the issue of liability for breach of contract months before Strachan began arguing about piercing the corporate veil. There was no motion, objection, or ruling on a piercing the corporate veil defense. As such, this issue was not preserved for appeal. We decline to address this unpreserved issue and dismiss this argument.

c. Liability Discharged and Mere Instrumentality

[3] Furthermore, Strachan contends that the trial court erred in failing to conclude that upon McKee's attempted "purchase" of a liability where he was both creditor and debtor was, by law, not a purchase, but a discharge of the liability, and thereby precluded McKee from bringing breach of contract claims against his co-guarantors through his mere instrumentality. We disagree.

These arguments mirror those raised in Strachan's first two arguments. The trial court did not err in failing to conclude the purchase was a discharge. In *Gillespie*, the purchase of the note was an assignment, not a discharge of the debt, since there was no evidence preventing an assignment nor were any documents cancelled or destroyed to show intent of a discharge. And again, we decline to entertain Strachan's piercing the corporate veil or "mere instrumentality" argument, because Strachan failed to preserve that issue.

d. Breach of Fiduciary Duty

[4] Next, Strachan contends that the trial court erred in granting McKee's Motion for Summary Judgment on Strachan's breach of fiduciary duty claim. We disagree.

A member-manager of a limited liability company owes no fiduciary duty to the other members; rather, the fiduciary duty is owed to the company. *Kaplan v. O.K. Technologies, LLC*, 196 N.C. App. 469, 474, 675 S.E. 2d 133, 137 (2009). Therefore, individual members cannot maintain a claim of breach of fiduciary duty against the manager. *Id.*

Here, McKee and Strachan were both members of ABMS and McKee was the member manager. Any fiduciary duty that McKee owed would

be to ABMS rather than Strachan. Accordingly, Strachan cannot assert the existence of a fiduciary duty against McKee. Therefore, the trial court did not err in granting McKee's Motion for Summary Judgment on Strachan's breach of fiduciary duty claim. *Id.*

e. Constructive Fraud

[5] Next, Strachan contends the trial court erred in granting McKee's Motion for Summary Judgment on Strachan's constructive fraud claim. We disagree.

The elements for constructive fraud are: (1) a relationship of trust and confidence exists between the parties; (2) the relationship led up to and surrounded the consummation of the transaction in which defendant took advantage of its position; and (3) defendant sought to benefit from the transaction. *Trillium Ridge Condo. Ass'n v. Trillium Links & Vill., LLC*, 236 N.C. App. 478, 502, 764 S.E.2d 603 (2014). Further, to establish constructive fraud the plaintiff must show the existence of a fiduciary duty and a breach of that duty. *Piles v. Allstate Ins. Co.*, 187 N.C. App. 399, 406, 653 S.E.2d 181, 186 (2007), *rev. denied*, 362 N.C. 361, 663 S.E.2d 316 (2008).

As we held above, there was no fiduciary duty, and therefore, such duty could not have been breached. As a result, the trial court did not err in granting McKee's Motion for Summary Judgment on Strachan's constructive fraud claim.

III. Motion to Join

A. Standard of Review

"A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

B. Analysis

[6] Lastly, Strachan contends the trial court erred in denying his motion to join ABMS in the action. We disagree.

N.C. Gen. Stat. § 26-12 provides that "the law allows permissive or discretionary joinder." *High Point Bank & Trust Co.*, 368 N.C. 301, 308, 776 S.E.2d 838, 844 (2015). "[W]hen any surety is sued by the holder of the obligation, the court, on motion of the surety may join the principal

as an additional party defendant." *Id.* Strachan waited to file this motion years after asserting his counterclaims and more than a month after the trial court had entered summary judgment against him on the breach of contract claim, disposing of the case. The trial court found that joining ABMS would cause a delay in the entry of judgment against Strachan which was not necessary. The trial court has discretion to manage its dockets and deny a motion for joinder brought after undue delay. *United Leasing Corp. v. Miller*, 60 N.C. App. 40, 43, 298 S.E.2d 409, 411 (1982). As a result, the trial court did not abuse its discretion in denying the motion to join ABMS.

IV. Damages

A. Standard of Review

"The trial court's award of damages . . . is a matter within its sound discretion, and will not be disturbed on appeal absent abuse of discretion." *Helms v. Schultze*, 161 N.C. App. 404, 414, 588 S.E.2d 524, 530 (2003). "In order to reverse the trial court's decision for abuse of discretion, we must find that the decision was unsupported by reason and could not have been the result of competent inquiry." *Id.*

B. Analysis

a. Recovery Amount

[7] On cross-appeal, McKee contends that the trial court erred in holding McKee was limited to recovering half of the price he paid to purchase the Note, instead of the face value of the Note. We agree.

In *Gillespie*, this Court affirmed the trial court's ruling that the defendant was liable to the plaintiff for the face value of the note in light of the assignment. *Gillespie*, 53 N.C. App. at 269, 280 S.E.2d at 747; *see also Yates v. Brown*, 275 N.C. 634, 641, 170 S.E.2d 477, 482 (1969) (holding that to refuse to allow plaintiff to recover the face value of the note is contrary to North Carolina law and that purchase of a note at a discount does not preclude recovery of the face value of the note); *Pickett v. Fulford*, 211 N.C. 160, 164, 189 S.E. 488, 490 (1937) (upholding as valid assignment of note and deed of trust, even where note and deed of trust acquired after maturity and for face value of the note).

Here, C1 Bank assigned the Note to Bethesda via a Note Sale and Assignment Agreement, which made it clear that the transaction was an absolute assignment rather than a discharge. Since Bethesda received an assignment, it is entitled to recover the full value of the Note from Strachan.

b. Equitable Contribution

[8] McKee further contends that the trial court erred in applying the Doctrine of Equitable Contribution to reduce Strachan's liability by half. We agree.

"The rights of the obligee to a guaranty contract may be assigned under the principles of general contract law." *Gillespie*, 53 N.C. App. at 262, 280 S.E.2d at 743. "Where no adequate remedy at law exists, a contract is enforceable through [equitable remedies]." *Condellone v. Condellone*, 129 N.C. App. 675, 681-82, 501 S.E.2d 690, 695 (1998).

Here, this Court has held that the C1 Note was assigned to Bethesda, and that the assignment was controlled by contract law. Consequently, an equitable remedy, such as equitable contribution, would be inappropriate since there is an adequate remedy at law. Therefore, we hold that the trial court erred in applying the Doctrine of Equitable Contribution to reduce Strachan's liability.

V. Waiver Defenses

A. Analysis

[9] Next on cross-appeal, McKee contends that the trial court erred in holding that Strachan had not waived defenses such as equitable contribution. Because we have held that equitable contribution is not an available remedy in this case, the waiver of equitable contribution as a defense is moot. Therefore, we dismiss this argument.

AFFIRMED IN PART, REVERSED IN PART, DISMISSED IN PART, AND REMANDED.

Judges TYSON and INMAN concur.

IN RE J.D.

[267 N.C. App. 11 (2019)]

IN THE MATTER OF J.D.

No. COA18-1036

Filed 20 August 2019

1. Sexual Offenses—sexual exploitation of a minor—acting in concert—sufficiency of evidence—juvenile delinquency

In a juvenile delinquency case—where defendant forcibly placed his private parts on the minor victim's bare buttocks during a sleepover, his cousin filmed the event, and the video was posted on social media—there was insufficient evidence to convict defendant of second-degree sexual exploitation of a minor. Although the State argued that defendant and his cousin were acting in concert regarding the filming of the incident, the video showed defendant did not want to be filmed and explicitly asked his cousin to stop recording him. Moreover, there was no evidence that defendant was the one who distributed the video.

2. Sexual Offenses—forcible sexual offense—"sexual act"—sufficiency of evidence—juvenile delinquency

In a juvenile delinquency case—where defendant forcibly placed his private parts on the minor victim's bare buttocks during a sleepover, his cousin filmed the event, and the video was posted on social media—the trial court erred by denying defendant's motion to dismiss a charge of first-degree forcible sexual offense where the State presented insufficient evidence that defendant engaged in a "sexual act," as defined by N.C.G.S. § 14-27.20(4), with the victim. Specifically, the State could not prove that anal intercourse occurred where the victim testified that there was no penetration during the incident.

3. Juveniles—delinquency—admission of guilt—factual basis—sufficiency

In a juvenile delinquency case, the trial court erred by accepting defendant's admission of guilt to attempted larceny where it failed to find a sufficient factual basis to support the admission, as required by N.C.G.S. § 7B-2407(c), since the State failed to present evidence that defendant intended to steal someone else's bicycle or assist others in stealing it.

4. Juveniles—delinquency—right to confrontation—statutory mandate—prejudice

In a juvenile delinquency case—where defendant forcibly placed his private parts on the minor victim's bare buttocks during a sleepover, one of his cousins filmed the event, and the video was posted on social media—the trial court violated the statutory mandate in N.C.G.S. § 7B-2405 to protect defendant's constitutional right to confront witnesses by admitting his two cousins' out-of-court statements. Where the remaining evidence at trial—including the victim's testimony—indicated that no anal penetration took place that night, admission of the cousins' statements prejudiced defendant because his cousins said they thought he and the victim did have anal sex.

5. Juveniles—delinquency—disposition—higher level imposed—findings of fact—absent

Where the trial court adjudicated defendant a delinquent juvenile for committing two sexual offenses, the court erred by entering a level 3 disposition against him and committing him to a youth detention center where a court counselor recommended a level 2 disposition based on a report showing, among other things, that defendant's risk factors for engaging in future sexually harmful behaviors were in the "low to low moderate" range. The trial court failed to enter written findings explaining why it ignored the counselor's recommendations, nor did the court enter adequate findings required by N.C.G.S. § 7B-2501(c) to support a level 3 disposition.

6. Juveniles—delinquency—disposition—indefinite commitment to youth detention center—compelling reasons

At the disposition phase of a juvenile delinquency case, the trial court erred by indefinitely committing defendant to a youth detention center without entering written findings stating "compelling reasons" for the confinement, as required by N.C.G.S. § 7B-2605. Although some of the court's findings listed reasons supporting its disposition, the court phrased those reasons as contentions made by defense counsel and the State rather than as ultimate facts.

Judge DILLON dissenting.

Appeal by defendant from orders entered 13 November 2017 and 23 January 2018 by Judge Tabatha P. Holliday in Guilford County District Court. Heard in the Court of Appeals 13 March 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Stephanie A. Brennan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant.

ARROWOOD, Judge.

Defendant J.D. ("Jeremy[1]") appeals from an order finding him delinquent for the offenses of first-degree forcible sexual offense and second-degree sexual exploitation of a minor. For the following reasons, we reverse.

I. Background

This case arises from sexual misconduct by Jeremy towards a friend who was attending a sleepover at his house. The evidence tended to show as follows: On 18 November 2016, Jeremy hosted a sleepover for a friend, Zane. Two of Jeremy's cousins, Carl and Dan, also attended. All four boys were of middle-school age. During the night, Zane awoke to find his pants pulled down and Jeremy behind him. He believed someone was holding down his legs. Zane testified that he "felt [Jeremy's] privates on [his] butt" but that he did not feel them "go into [his] butt." Dan filmed much of the incident. In the video Jeremy can be heard saying "[Dan], do not record this." The video eventually ended up on Facebook.

A juvenile petition was filed against Jeremy based on the incident. A hearing on the matter was held in November 2017. Among the evidence presented were statements to the police from Dan and Carl, neither of whom testified at trial. Jeremy's motions to dismiss at the close of the State's evidence and at the close of all evidence were denied. Following the hearing, the trial court entered a written order adjudicating Jeremy delinquent based on the determination that Jeremy had committed first-degree forcible sexual offense for the assault and second-degree exploitation of a minor for his role in the recording of the assault.

The court, however, continued disposition until Jeremy could be assessed by the Children's Hope Alliance (CHA). The CHA report made numerous findings about Jeremy, including that his risk factors for

1. Pursuant to Rule 42 of the North Carolina Rules of Appellate Procedure, a pseudonym is used to protect the anonymity of each juvenile discussed in this case. N.C.R. App. P. 42 (2019).

sexually harmful behaviors were in the low to low moderate range. The court counselor recommended a level 2 disposition

Before the disposition hearing began, Jeremy admitted to an attempted larceny of a bicycle. On 23 January 2018, after considering Jeremy's assessments and his admission to larceny, the trial court entered an order punishing Jeremy at level 3 and committing him to a Youth Detention Center (YDC) indefinitely. Jeremy appealed and requested his release pending disposition of the appeal. A hearing was held on 20 February 2018 on the question of his release. The trial court entered an order concluding Jeremy would remain in YDC.

II. Discussion

Defendant argues the trial court erred by: (1) denying his motion to dismiss the second-degree sexual exploitation of a minor charge, (2) denying his motion to dismiss the first-degree forcible sexual offense charge, (3) accepting his admission to attempted larceny when there was an insufficient factual basis, (4) violating the statutory mandate to protect his confrontation right, and (5) failing to include findings and conclusions that a level 3 disposition was appropriate in the disposition order and committing him to YDC pending the outcome of the appeal without finding compelling reasons for the confinement. We address each of these issues in turn.

1. Second-Degree Sexual Exploitation of a Minor

[1] The trial court found defendant guilty of second-degree sexual exploitation of a minor. We find that the trial court erred in denying the motion to dismiss because the evidence was insufficient to support this charge as a matter of law.

Whether the trial court erred in denying a motion to dismiss is reviewed *de novo*. *In re A.N.C.*, 225 N.C. App. 315, 324, 750 S.E.2d 835, 841 (2013). In order to prevail on a motion to dismiss in a juvenile matter, the State must offer "substantial evidence of each of the material elements of the offense alleged." *In re Eller*, 331 N.C. 714, 717, 417 S.E.2d 479, 481 (1992). Taking the evidence in the light most favorable to the State, as we are required to do, *In re A.W.*, 209 N.C. App 596, 599, 706 S.E.2d 305, 307 (2011), evidence must be "sufficient to raise more than a suspicion or possibility of the respondent's guilt." *In re Walker*, 83 N.C. App. 46, 48, 348 S.E.2d 823, 824 (1986) (citation omitted).

Second-degree sexual exploitation of a minor requires evidence that *the defendant knowingly "film[ed]" or "[d]istribut[ed] . . . material* that contains a visual representation of a minor engaged in sexual

activity." N.C. Gen. Stat. § 14-190.17 (2017) (emphasis added). "[T]he common thread running through the conduct statutorily defined as second-degree sexual offense [is] that *the defendant [took] an active role in the production or distribution of child pornography* without directly facilitating the involvement of the child victim in the activities depicted in the material in question." *State v. Fletcher*, 370 N.C. 313, 321, 807 S.E.2d 528, 535 (2017) (emphasis added).

The State argues that the trial court properly concluded that Jeremy and Dan were acting in concert in regards to the filming of the incident and relies on *State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979), which found that:

> [i]t is not, therefore, necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

Id. at 357, 255 S.E.2d at 395.

The State contends the evidence shows that the boys' common plan or purpose was to humiliate the victim. There is nothing in the record to support this. In fact, from the evidence, it is clear that Jeremy does not want to be filmed, as he explicitly tells Dan to stop recording. Although he was in the video, Jeremy was being filmed against his will. "Mere presence at the scene of a crime is not itself a crime, absent at least some sharing of criminal intent." *State v. Holloway*, __ N.C. App. __, __, 793 S.E.2d 766, 774 (2016) (citation omitted), *writ denied*, *discretionary review denied*, 369 N.C. 571, 798 S.E.2d 525 (2017). Furthermore, there was no evidence presented that Jeremy wished for this video to be made or that he was the one who distributed it.

Because there was no evidence that Jeremy took an active role in the production or distribution of the video, the trial court erred in denying Jeremy's motion to dismiss the charge of second-degree sexual exploitation of a minor. Jeremy's adjudication for this charge should be vacated.

2. First-Degree Forcible Sexual Offense

[2] In order to meet its burden to convict a defendant of first-degree sexual offense the State must show that defendant (1) "engage[d] in a sexual act with another person by force and against the will of the other

person," and (2) the existence of at least one of three additional factors. *See* N.C. Gen. Stat. § 14-27.26 (2017). Because the evidence is not sufficient to show that Jeremy engaged in a "sexual act" with Zane, we need not reach the additional factors.

A "sexual act" is defined as "[c]unnilingus, fellatio, analingus, or anal intercourse[.]" In order to have a sexual act there must be "penetration, however slight by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.20(4) (2017). On the other hand, "sexual contact" is defined as the (i) "[t]ouching the sexual organ, anus, breast, groin, or buttocks of any person," (ii) "[a] person touching another person with their own sexual organ, anus, breast, groin, or buttocks . . ." N.C. Gen. Stat §14-27.20(5) (2017).

At trial, Zane denied that anal intercourse occurred. Zane testified that he only "felt [defendant's] privates on [his] butt" but, when asked if he felt defendant's privates go into his butt, however slightly, he responded "[n]ot that I know of." Furthermore, the prosecutor admitted at trial that, "there was not evidence of penetration."

This Court has found that a totality of the evidence, including substantial evidence of penetration, along with the victim's ambiguous statement that penetration may have occurred, is sufficient for a finding that penetration did occur. *See State v. Sprouse*, 217 N.C. App. 230, 237, 719 S.E.2d 234, 240 (2011); *State v. Estes*, 99 N.C. App. 312, 316, 393 S.E.2d 158, 160 (1990). However, in the instant case, the victim's statement is not ambiguous. Zane specifically states in his testimony that penetration did not occur. Thus, the State has failed to prove penetration, the central element of this crime.

To support its contention that intercourse occurred, the State relies upon the video taken by Dan. This video shows no more than two boys engaged in "sexual contact" not a "sexual act." While it may have been sufficient to have shown that defendant engaged in sexual contact by force against the will of Zane, which is sexual battery in violation of N.C. Gen. Stat. §14-27.33 (2017), it does not show a sexual act necessary to prove forcible sexual assault.

Given Zane's testimony that no sexual penetration occurred, this case is similar to *State v. Hicks*, 319 N.C. 84, 90, 352 S.E.2d 424, 427 (1987) where our Supreme Court reversed a sexual offense conviction, given the ambiguity of the victim's testimony as to whether anal intercourse had occurred. The dissent chooses to ignore Zane's denial of penetration and argues that, when taking the evidence in the light most favorable to the State, the trial court did not err. The fatal flaw in

the dissent's argument is that circumstantial evidence cannot be used to overcome a victim's direct testimony that no penetration occurred.

Because there was not substantial evidence for anal intercourse, even when looking at the evidence in the light most favorable to the State, the trial court erred in denying defendant's motion to dismiss the charge of first-degree sexual offense.

3. Attempted Larceny Admission

[3] The trial court found that there was a sufficient factual basis to support defendant's admission to attempted larceny. We disagree.

The trial court must determine that there is a sufficient factual basis for a juvenile's admission of guilt before accepting the admission, and this factual basis may be based on statements presented by the attorneys. N.C. Gen. Stat. § 7B-2407(c) (2017); *In re C.L.*, 217 N.C. App. 109, 114, 719 S.E.2d 132, 135 (2011). This court has found that if the State fails to provide information in compliance with N.C. Gen. Stat. § 7B-2407(c) then the juvenile's admission of guilt must be vacated. *In re D.C.*, 191 N.C. App. 246, 248, 662 S.E.2d 570, 572 (2008).

Attempted larceny requires proof that the defendant took affirmative steps, but did not succeed, to take another's property with no intent to return it. *See State v. Weaver*, 123 N.C. App. 276, 287 473 S.E.2d 362, 369 (1996) (setting forth the elements of attempted larceny).

The facts presented at trial do not support Jeremy's admission of guilt. The bicycle was stolen by two black males. Jeremy, a black male himself, was later found by officers biking down the road with two others who also matched the description. He was described by the prosecutor as "kind of off on his own" from the other two. When asked to stop by the officers, of the three, only Jeremy stopped. Jeremy told officers that he had not stolen the bicycle, that he knew who had, and admitted to having bolt cutters in his back pack.

There was not a showing of the requisite intent that defendant intended to steal, or assist others in stealing, the bicycle. Defendant's counsel argued that defendant loaned someone his book bag, who then placed bolt cutters inside it and left to "do their deed." The State presented no evidence, except to mention that "I believe the property was recovered." It is unclear where or from whom the bicycle was recovered.

Because the State failed to present sufficient evidence that defendant attempted to steal the bicycle, the trial court erred in accepting Jeremy's admission of attempted larceny. The adjudication for attempted larceny should be vacated.

4. Defendant's Right of Confrontation

[4] In addition to the video of the incident and testimony from Jeremy and Zane, the State offered out-of-court statements from Dan and Carl, statements which tended to support the charges against Jeremy. These statements are part of the circumstantial evidence which the dissent relies upon to try to overcome the victim's testimony that no penetration occurred. Jeremy argues that these statements were admitted in violation of his constitutional right to confront and cross-examine witnesses.[2] We agree and conclude that the error was prejudicial.

Errors affecting constitutional rights are presumed to be prejudicial and warrant a new trial unless the State can prove that the error was harmless beyond a reasonable doubt. *State v. Knight*, 245 N.C. App. 532, 548, 785 S.E.2d 324, 336 (2016) (citation omitted), *aff'd as modified*, 369 N.C. 640, 799 S.E.2d 603 (2017).

The State argues that the evidence was overwhelming where there was a videotape of the assault and testimony from the victim and defendant. However, the evidence presented at trial was not overwhelming. Zane denied that any penetration occurred and the video evidence was, at most, ambiguous. In order to attempt to overcome Zane's testimony, the State referenced Dan and Carl's statements numerous times in its closing argument (e.g., "all [Dan] know[s] about the video is that they was doing it;" "[Dan] showed a clear understanding of what he was seeing. He says, sex. He's asked, do you know what sex is? And he explains it, basically male penetrate another person, basically"). Even though Dan and Carl both stated they thought Zane and Jeremy were having sex, they also both stated that Zane consented, that it was Zane's idea, and that he pulled his own pants down. It cannot be said that this additional

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2. The State contends that this issue is not properly before us on appeal, as Jeremy failed to object to the entry of Dan and Carl's statements at trial. It is true that "[t]he constitutional right of an accused to be confronted by the witnesses against him is a personal privilege which he may waive expressly or by a failure to assert it in apt time even in a capital case." *State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985) (citation and emphasis removed).

However, Section 7B-2405 of our General Statutes provides that our courts are to protect the rights of a juvenile defendant during a delinquency hearing, and has been considered a "statutory mandate." *Matter of J.B.*, __ N.C. App. __, __, 820 S.E.2d 369, 371 (2018) (citations omitted). "The plain language of N.C. Gen. Stat. § 7B-2405 places an affirmative duty on the trial court to protect the rights delineated therein during a juvenile delinquency adjudication." *In re J.R.V.*, 212 N.C. App. 205, 210, 710 S.E.2d 411, 414 (2011). And, "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). Therefore, this issue is properly before this Court.

evidence that penetration occurred was not prejudicial to defendant's defense. Therefore, the State has failed to prove this testimony was harmless beyond a reasonable doubt.

5. Sentencing Errors

Although we find that the judgment must be reversed because of the errors set forth above, and therefore the disposition vacated, we feel it is also important to address the errors made by the trial court during the sentencing phase of the case.

i. Level 3 Disposition

[5] While the State argues that the trial court sufficiently found each of the five statutorily required factors from N.C. Gen. Stat. § 7B-2501(c) to support a level 3 disposition, we find that there are not adequate written reasons in the Disposition and Commitment Order to support its findings.

Under Section 7B-2501, the trial court is required to make findings of fact as to a number of enumerated factors regarding the best interests of the delinquent child and the protection of the public, as follows:

(1) The seriousness of the offense;
(2) The need to hold the juvenile accountable;
(3) The importance of protecting the public safety;
(4) The degree of culpability indicated by the circumstances of the particular case; and
(5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c) (2017). "[A] trial court must consider each of the factors in Section 7B-2501(c) when entering a dispositional order." *Matter of I.W.P.*, __ N.C. App. __, __, 815 S.E.2d 696, 704 (2018). Whether the trial court properly complied with its statutory duty to make findings is a question of law to be reviewed *de novo*. *See In re G.C.*, 230 N.C. App. 511, 516, 750 S.E.2d 548, 551 (2013) (citations omitted).

CHA found that Jeremy's risk factors for sexually harmful behaviors are in the low to low moderate range. Jeremy's evaluation from the court counselor indicated that he "is a low/moderate risk for reoffending." The counselor recommended a level 2 disposition. The recommended terms of level 2 include, but are not limited to: cooperating with the TASK program and group therapy, having a curfew, not participating in sleepovers, having electronic devices monitored, not being used as a babysitter, maintaining passing grades at school, and not having contact

with the victim. These suggested terms would have effectively satisfied the requirements of N.C. Gen. Stat. § 7B-2501(c).

The trial court found that the "[j]uvenile requires personal accountability for his actions [and] . . . requires more structure." It is unclear how the trial court reaches this conclusion as to why defendant must be committed at the YDC as his own home can provide him accountability and structure. The report from CHA indicated that defendant had a stable home life. The report further notes that defendant's family relationships are "noted to be 'close' and supportive" and that there was no reported history of Department of Social Services (DSS) visits or experiences with physical or sexual abuse.

The trial court also found that defendant's "level of regulation in the short term is low." CHA had Jeremy complete the Adolescent Self-Regulatory Inventory (ASRI), which indicated he had "some level" of self-regulation, "some level" of short-term self-regulation and a "moderate level" of long-term self-regulation. The lowest score for short-term self-regulation is 13, the middle score is 39, and 65 is the highest score. Jeremy scored a 36, which is much closer to the middle score than the lowest score. The trial court did not indicate why any potential issues with Jeremy's self-regulation could only be corrected by sending defendant to YDC instead of the recommended counseling sessions.

The trial court further found that "[j]uveniles [sic] YDC commitment and treatment will protect the public and provide juvenile the opportunity to mature regarding opportunistic and impulsive behavior." However, the order also noted that if there is not sex-specific individual or group therapy available at the YDC then he will complete it during his post-release supervision period. Having access to this therapy is essential towards the goal of N.C. Gen. Stat. § 7B-2501(c) to protect the public and meet the needs and best interests of defendant. It would be more appropriate to ensure that defendant received this counseling now, as opposed to when he is released from YDC.

This Court has stated it:

> cannot overemphasize the importance of the intake counselor's evaluation in cases involving juveniles alleged to be delinquent or undisciplined. The role of an intake counselor is to ensure that the needs and limitations of the juveniles and the concern for the protection of public safety have been objectively balanced before a juvenile petition is filed initiating court action.

In re Register, 84 N.C. App. 336, 346, 352 S.E.2d 889, 894-95 (1987).

Furthermore, while the State attempts to reconcile the order's findings with the requirements of N.C. Gen. Stat. § 7B-2501(c), the trial court should have adequately explained its own reasoning.

> Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980).

Here, when taking into account the evaluations by the court counselor and CHA, the trial court failed to effectively explain its decision to ignore their evaluations and instead commit defendant to YDC, and it fails to further explain how its findings satisfied all of the factors required by N.C. Gen. Stat. § 7B-2501(c).

ii. Confinement Pending the Outcome of this Appeal[3]

[6] The State contends that the trial court did not err because it stated compelling reasons for its denial. However, the trial court did not state its own reasons for its denial and instead referenced reasons given by defense counsel and the State.

> Pending disposition of an appeal, the release of the juvenile, with or without conditions, should issue in every case unless the court orders otherwise. *For compelling reasons*

3. The State contends that this issue is both not properly before us and also moot upon resolution of Jeremy's appeal. It is true that Jeremy has not appealed the order denying his release pending appeal, but our Court has oft reviewed this issue without a separate appeal. *See In re J.L.B.M.*, 176 N.C. App. 613, 628, 627 S.E.2d 239, 249 (2006); *In re Bass*, 77 N.C. App. 110, 116-17, 334 S.E.2d 779, 782-83 (1985). In the same respect, though his appeal will no longer be pending upon issuance of this opinion, our Court has repeatedly chosen to address this issue despite similar circumstances. *See In re J.J., Jr.*, 216 N.C. App. 366, 376, 717 S.E.2d 59, 66 (2011) (vacating an insufficient order despite "the likelihood that the passage of time may have rendered the issue of [the] juvenile's custody pending appeal moot") (quoting *In re Lineberry*, 154 N.C. App. 246, 256, 572 S.E.2d 229, 236 (2002); *In re J.L.B.M.*, 176 N.C. App. at 628, 627 S.E.2d at 249 (citation omitted)). In the interest of judicial economy, we reach the merits of this claim in the present appeal.

> *which must be stated in writing*, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.

N.C. Gen. Stat. § 7B-2605 (emphasis added).

The Appellate Entries form filed on 22 February 2018 did not list anything under "[c]ompelling reasons release is denied." The court then issued a separate order with Findings of Fact and Conclusions of Law about the matter on 19 March 2018. In pertinent part, the Findings of Fact are:

> 2. That the defense Attorney, Marcus Jackson, contends that the juvenile may be served by being home and under house arrest along with other conditions pending appeal.
>
> 3. That the State has raised issues of lack of structure in the home and continued delinquent behavior after being charged with a B1 felony. That the juvenile has been provided treatment as a result of the adjudication and the Youth Development Center program.

"The trial court may not simply recite allegations, but must through processes of logical reasoning from the evidentiary facts find the ultimate facts essential to support the conclusions of law." *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (citations and internal quotation marks omitted) (finding that "stating a single evidentiary fact and adopting DSS and guardian *ad litem* reports" are not "specific ultimate facts").

In the instant case, there were no compelling reasons stated on the Appellate Entries form. There were supporting reasons among the Findings of Facts on the subsequent order, but they were phrased as contentions of defense counsel and the State. The trial court did not list independent compelling reasons on either the Appellate Entries form or the order, thus violating the provisions of N.C. Gen. Stat. § 7B-2605, and, as such, the trial court erred by committing defendant to YDC pending the outcome of this appeal. In this case, where we have reversed the determination of delinquency, it is especially disturbing that the trial court ignored the requirements of the statute thus causing the juvenile to be held in detention for a period of 17 months when his convictions were improper.

III. Conclusion

For all the foregoing reasons, we reverse this case and remand this matter to the district court.

REVERSED AND REMANDED.

Judge BRYANT concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

This appeal is from an order by the trial court adjudicating Jeremy delinquent based on the trial court's finding that Jeremy committed first-degree forcible sexual offense and second-degree sexual exploitation of a minor.

The evidence before the trial court was conflicting. To be sure, there was strong evidence suggesting that Jeremy did not commit these offenses. However, in a juvenile delinquency proceeding, it is the trial court judge – and not the judges on our Court – who resolves any conflicts in the evidence. I conclude that the evidence was sufficient to support the trial court's findings and its ultimate order. My vote, therefore, is to affirm the order of the trial court.

I. Summary of Evidence

A delinquency petition was filed against Jeremy, based on a sexual encounter he had with another boy, Zane, during a sleepover. Two of Jeremy's cousins, Carl and Dan, also attended the sleepover. Dan recorded a portion of the sexual encounter on a cellphone, a recording which was subsequently uploaded to the internet.

Based on the evidence presented during the adjudication phase, the trial court essentially found that Jeremy penetrated Zane's anal opening with his penis, at least slightly; with some degree of force and against Zane's will; while being aided and abetted by Carl and/or Dan; and that he participated in the recording and/or distribution of the video.

Most of the arguments on appeal concern whether there was sufficient evidence that Jeremy committed the offenses. A summary of the evidence is as follows:

A. The Video

The State offered Dan's cellphone recording into evidence. The video lasts less than a minute. For the entire recording, Jeremy and Zane are seen with their pants down; Zane is slumped over a piece of furniture; Jeremy is behind Zane; the front of Jeremy's pelvic area (including his penis) is pressed against Zane's buttocks; and Jeremy is engaged in a constant thrusting motion into Zane's buttocks.

In the video, Jeremy is seen turning his face towards Dan's cellphone and stating, "[Dan], don't record this." Dan responds in a joking voice that he is not recording, to which Jeremy states, "Yeah, right," in a sarcastic tone suggesting that he knows that Dan is recording. In any event, it appears that the cellphone was being held up by Dan where Jeremy could see it.

Jeremy then turns his head back towards the back of Zane's head. He continues his thrusting motion and begins to pull at the back of Zane's head and hair. Zane, whose eyes are open the entire time and who has otherwise been rather quiet and passive while Jeremy is thrusting, begins to show and express discomfort.

At the end of the video, Jeremy turns his face back towards Dan and the cellphone and gives a "thumbs up" gesture, as he continues his thrusting motion. The video then ends.

B. Zane's Testimony

Zane testified at the hearing as follows:

He was asleep. He awoke to discover himself on his knees slumped over a piece of furniture, his pants were down, and Jeremy was thrusting into his bare buttocks. He felt someone else holding down the bottom of his legs, restraining his movements. He could feel Jeremy's penis in his buttocks but did not believe that Jeremy's penis penetrated his anal opening. Once he fully realized what was happening to him, he struggled and was able to push Jeremy off of him. Shortly thereafter, he, Jeremy, and the other boys went to sleep. He reported the incident sometime later after the video had been uploaded to the internet.

C. Jeremy's Pre-trial Statement

Jeremy gave a statement during the investigation of the matter. He stated that the entire encounter was consensual. He described the encounter as "intercourse." He stated that he had a partial erection and that he could feel his penis pressing against Zane's anal opening as he

was thrusting, but did not believe that his penis actually penetrated Zane's anus.

D. Dan and Carl's Pre-trial Statements

Dan and Carl were each interviewed by investigators prior to the hearing. Their recorded interviews were offered into evidence by the State without objection.

Both testified that Zane had consented to the sexual encounter, that it was Zane's idea, and that Zane pulled his own pants down. Both stated that they were uncomfortable about what was happening. Dan stated he began recording the encounter because he thought Jeremy and Zane were just joking around. Carl stated that he stood off in the corner because he felt uncomfortable. Both stated that they thought Jeremy and Zane were having "sex." Dan stated that he understood that "sex" included "penetration." However, neither witness stated that he was actually able to see exactly where Jeremy's penis was in relation to Zane's anal opening.

Both described that they all went to sleep after the encounter.

II. Analysis

Jeremy makes a number of arguments on appeal contesting the trial court's order. I address each in turn.

A. Sufficiency of the Evidence

Jeremy argues, and the majority agrees, that there was insufficient evidence that he engaged in the criminal conduct alleged in the petition.

In determining whether there was sufficient evidence, our Court must view the evidence "*in the light most favorable to the State.*" *In re Eller*, 331 N.C. 714, 717, 417 S.E.2d 479, 481 (1992) (emphasis added). There was certainly conflicting evidence. But viewing the evidence in the light most favorable to the State, I conclude that there was sufficient evidence from which the trial court judge could find that Jeremy committed these offenses, as explained below.

1. First-Degree Forcible Sexual Offense

To prove first-degree forcible sexual offense, the State must prove (a) that the defendant "engage[d] in a sexual act with another person," (b) "by force and against the will of the other person," and (c) that there existed at least one of three certain aggravating factors. N.C. Gen. Stat. § 14-27.26 (2015).

a. Evidence of a Sexual Act

The petition in this case alleges that Jeremy committed "anal intercourse[]", which is a "sexual act" defined in Section 14-27.20(4) of our General Statutes. N.C. Gen. Stat. § 14-27.20(4) (2015) (defining "[s]exual act" as including "anal intercourse").

Jeremy argues, and the majority agrees, that there was insufficient evidence that Jeremy's penis actually penetrated Zane's anal opening. Indeed, "[a]nal intercourse requires *penetration* of the anal opening of the victim by the [defendant's] penis[.]" *State v. DeLeonardo*, 315 N.C. 762, 764, 340 S.E.2d 350, 353 (1986) (emphasis added). However, the State need not prove that total penetration occurred; penetration can be very slight to satisfy this element. *Id.*; N.C. Gen. Stat. § 14-27.36 (2015) ("Penetration, however slight, is . . . anal intercourse.")[1] .

There was certainly some evidence that penetration did not occur. For instance, Zane himself testified that he did not believe that Jeremy penetrated him. However, Zane also stated that he was not fully awake during much of the assault.

In any event, there was other evidence from which a fact-finder could find that slight penetration did occur, namely the cellphone video itself and Jeremy's own statement.

Regarding the cellphone video, it admittedly does not offer *direct* evidence of penetration, as the exact position of Jeremy's penis is obscured by his pelvis pressed against Zane's buttocks. The video, though, does constitute sufficient *circumstantial* evidence of penetration. Specifically, it shows the position and proximity of Jeremy to Zane and his constant thrusting motion towards Zane's anus. Our Supreme Court has held that penetration can be proven by *circumstantial* evidence alone. *See, e.g.*, *State v. Robinson*, 310 N.C. 530, 534, 313 S.E.2d 571, 574 (1984) (holding that penetration in a rape prosecution can be proven either by direct testimony "or by circumstantial evidence"); *State v. Santiago*, 148 N.C. App. 62, 70, 557 S.E.2d 601, 607 (2001) (holding that "circumstantial evidence may be utilized" to prove penetration). Indeed, it is axiomatic in jurisdictions across our country that "[e]vidence of the condition, position, and proximity of the parties as testified to by eyewitnesses may afford sufficient [circumstantial] evidence of penetration" even where a view of the genitals is obscured. 81 C.J.S. Sodomy § 11,

1. This section was previously codified at N.C. Gen. Stat. § 14-27.10. Recodified as cited effective 1 December 2015, after the events of this case transpired.

note 42 (1977).[2] Accordingly, the video itself was sufficient for the trial court to make a finding that penetration occurred.[3]

Jeremy's own statement, itself, is evidence of penetration: he admitted that he had a semi-erect penis; that his penis was pressing against Zane's anus; that he was thrusting; and he described the encounter as "intercourse." A fact-finder could infer from this statement that at least the tip of Jeremy's penis slightly penetrated Zane's anal opening, though his entire penis may not have penetrated.

The trial court weighed what it saw in the video and Jeremy's statements against the evidence suggesting that penetration did not occur, and the trial court found that at least slight penetration did occur. I see no error here. It is not our role to reweigh the evidence and make a different finding.[4]

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2. *See Taylor v. State*, 374 P.2d 786, 788-89 (Okla. Crim. App. 1962) (sustaining verdict based on circumstantial evidence of eyewitness, recognizing that "it has been held in several jurisdictions that the condition, position and proximity of defendants, as testified to by eyewitnesses, afford sufficient evidence of penetration . . . since it is very seldom that penetration can be observed in cases involving sex offenses"), *citing Commonwealth v. Bowes*, 74 A.2d 795 (Pa. Super. Ct. 1950), *and State v. Crayton*, 116 N.W. 597 (Iowa 1908). *See also Holmes v. State*, 20 So.3d 681, 683 (Miss. Ct. App. 2008) (holding that testimony of eyewitness who found the defendant in a compromising position with a minor, though not seeing the actual position of the defendant's genitals, was sufficient to prove penetration, stating "[w]hile penetration must be proved beyond a reasonable doubt, it need not be proved in any particular form of words, and circumstantial evidence may suffice"); *State v. Golden*, 430 A.2d 433, 435-37 (R.I. 1981) (concluding that testimony of police officer that the defendant was naked on top of victim was sufficient to prove penetration); *Marshall v. State*, 223 S.W.3d 74, 78 (Ark. Ct. App. 2006); *Knowlton v. State*, 382 N.E.2d 1004, 1008-09 (Ind. Ct. App. 1978) (holding that eyewitness testimony that the defendant had assumed a position appropriate for a sexual act with another, that the defendant was close enough to the other person to be touching, that the defendant's pants were unzipped, and that his penis was erect was sufficient circumstantial evidence to prove penetration); *Ryan v. Commonwealth*, 247 S.E.2d 698, 702 (Va. 1978) (holding that "evidence of condition, position, and proximity of the parties . . . may afford sufficient evidence of penetration"); *State v. Pratt*, 116 A.2d 924, 925 (Me. 1955) (holding that "the fact of penetration may be proved by circumstantial evidence as by the position of the parties and the like").

3. Our Supreme Court did hold that the circumstantial evidence in *Robinson* was *not* sufficient to establish penetration. However, in that case, no witness actually saw the defendant and the victim in a sexual position, but rather they were discovered unclothed after the assault. Accordingly, the Court ruled that this circumstantial evidence was sufficient to establish something "disgusting and degrading" was occurring, but not sufficient to establish that actual penetration of the victim's vagina by the defendant's penis had occurred. *Robinson*, 310 N.C. at 534, 313 S.E.2d at 574.

4. This case is different from cases like *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987), where it was held that evidence of penetration was insufficient where the victim denied or was ambiguous as to whether penetration actually occurred. Specifically, in *Hicks*, there was *no* other evidence, direct or circumstantial, which *supported* a finding of

b. Evidence of Force and Lack of Consent

There was evidence that Zane had not given his consent to Jeremy's actions and that Jeremy used some degree of force. Specifically, Zane testified at the hearing that the video did not depict the entire assault and that he was asleep when the assault started. He testified that he fully awoke to Jeremy pulling on his hair while thrusting his bare pelvis into Zane's bare buttocks. Zane testified that he felt someone holding his legs down as the assault was occurring. Zane testified that he pushed Jeremy off of him soon after the recording stopped. There is nothing in the video itself which suggests *conclusively* that Zane was, in fact, participating willingly. And there is some evidence in the video that he was being subdued by Jeremy, as Jeremy is seen pulling on Zane's hair.

Admittedly, there was strong evidence that Zane was a willing participant. For instance, Jeremy, Carl, and Dan all stated during the investigation that the incident was Zane's idea and that Zane and Jeremy each pulled their own pants down.

But, again, factual discrepancies were for the trial court, and not our Court, to resolve. Therefore, I conclude that there was sufficient evidence to support that Jeremy acted with force and against Zane's will. *See State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980) ("Contradictions and discrepancies are for the [factfinder] to resolve and do not warrant dismissal.").

c. Evidence that Jeremy was Aided and Abetted

The petition alleges that Jeremy committed the sexual act while "aided and abetted by one or more other persons[,]" which is an aggravating factor enumerated in Section 14-27.26(a)(3). N.C. Gen. Stat. § 14-27.26(a)(3) (2015). The trial court so found; and for the following reasons, I conclude that there was sufficient evidence to support this finding.

Aiding and abetting has been described by our Supreme Court as follows:

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penetration which could be weighed by the finder of fact against the victim's exculpatory statement. *Id.* at 90, 352 S.E.2d at 427. *Hicks* and similar cases do *not* stand for the proposition that a victim's denial of actual penetration is conclusive if there is other evidence which supports a finding of penetration. Indeed, there are many reasons why a victim might not want to admit that he was actually penetrated. Of course, where the victim has denied actual penetration and where there is no evidence to the contrary, it is inappropriate for the fact-finder to speculate. But where there *is* evidence of penetration, the fact-finder, the trial court in the present case, is free to disbelieve the victim.

> A person aids when being present at the time and place he does some act to render aid to the actual perpetrator of the crime, though he takes no direct share in its commission; and an abettor is one who gives aid and comfort, or either commands, advises, instigates or encourages another to commit a crime.

State v. Holland, 234 N.C. 354, 358, 67 S.E.2d 272, 274-75 (1951). An individual's *mere presence* during the commission of a crime, though, does not typically constitute aiding and abetting. *State v. Hoffman*, 199 N.C. 328, 333, 154 S.E. 314, 316 (1930). However, "when the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement." *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999).

When viewed in the light most favorable to the State, the evidence supports an inference that Jeremy was aided and abetted by his cousin Dan. Specifically, the video depicts them in conversation which could be inferred as joking about the recording being made. Further, towards the end of the video, Jeremy gives Dan a "thumbs up" signal. A fact-finder could certainly infer from their tone and actions that Dan and Jeremy were joking with each other during the assault and that Dan was not simply a passive bystander, but rather a source of encouragement.

Further, there was some evidence, though admittedly weak, from which one could infer that Carl aided Jeremy's assault. Specifically, Zane testified that he felt his legs being held down by someone that he believed was not Jeremy during Jeremy's assault, testimony which would support a finding that Carl was holding Zane down while Jeremy was engaged in the sexual assault.

2. Sexual Exploitation of a Minor

Sexual exploitation of a minor requires evidence that Jeremy "record[ed]" or "distribut[ed] . . . material that contains a visual representation of a minor engaged in sexual activity." N.C. Gen. Stat. § 14-190.17 (2017).

It is undisputed that Jeremy did not *personally* record the incident, and there is no direct evidence that Jeremy participated in the publishing of the recording. But again, the evidence *in the light most favorable to the State* supports an inference that Jeremy *acted in concert* with Dan to record the incident.

Under the acting in concert doctrine, an individual need not personally commit any portion of an alleged crime as long as he is (1) "present at the scene of the crime[,]" and (2) "acts [] together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979). Our Supreme Court has held that a common plan or purpose may "be shown by circumstances accompanying the unlawful act and conduct of the defendant subsequent thereto." *State v. Westbrook*, 279 N.C. 18, 42, 181 S.E.2d 572, 586 (1971). "The communication or intent to aid, if needed, does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators." *State v. Sanders*, 288 N.C. 285, 290-91, 218 S.E.2d 352, 357 (1975).

Here, Jeremy was indisputably present. Though Jeremy is heard telling Dan not to video the incident, a fact-finder could certainly infer from Jeremy's tone and the position of the cellphone that Jeremy knew that he was being recorded and was in approval of the recording. Jeremy's "thumbs up" gesture at the end of the recording can reasonably imply knowledge and approval and that he was working with Dan to get a recording of the assault. Certainly other inferences could be made from the evidence, but the resolution of conflicting inferences is for the trial court to sort out.

B. Right of Confrontation

The State offered into evidence the recordings of interviews of Carl and Dan, Jeremy's cousins, by investigators. Jeremy did not object. Indeed, much of their testimony benefited Jeremy as they described the entire encounter as consensual. However, Jeremy argues that portions of their statements were harmful to him and that admission of these statements was in violation of his constitutional right to confront and cross-examine witnesses against him. Specifically, Jeremy contends that Carl and Dan provided some testimonial evidence that actual penetration by Jeremy's penis of Zane's anal opening occurred.

The State contends that this issue is not properly before us on appeal, as Jeremy failed to object to the entry of Dan and Carl's statements at trial.

It is true that "[t]he constitutional right of an accused to be confronted by the witnesses against him is a personal privilege which he may waive expressly or by a failure to assert it in apt time even in a capital case." *Braswell*, 312 N.C. at 558, 324 S.E.2d at 246 (emphasis removed).

However, Section 7B-2405 of our General Statutes provides that our courts are to protect the rights of a juvenile defendant during a delinquency hearing and has been considered a "statutory mandate." *Matter of J.B.*, ___ N.C. App. ___, ___, 820 S.E.2d 369, 371 (2018); N.C. Gen. Stat. § 7B-2405 (2015). "The plain language of N.C. Gen. Stat. § 7B-2405 places an affirmative duty on the trial court to protect the rights delineated therein during a juvenile delinquency adjudication." *In re J.R.V.*, 212 N.C. App. 205, 210, 710 S.E.2d 411, 414 (2011). And, "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). Therefore, this issue is properly before this Court.

Section 15A-1443 provides that when a preserved issue is based on a statute, it is the defendant's burden on appeal to show that there is a reasonable possibility that, but for the error, a different result would have occurred. N.C. Gen. Stat. § 15A-1443(a) (2015). However, where the preserved issue is based on a constitutional right, the burden is on the State to show that the error was not harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b).

Of course, some errors may be based on both a constitutional right and a statutory right. And it could be argued that the error Jeremy complains of is technically statutory in nature, and, therefore, Jeremy is only entitled to "reasonable possibility" review. That is, Jeremy has waived his constitutional argument by not objecting; and, therefore, it is only Jeremy's statutory right under Section 7B-2405 that is preserved for appellate review.

But our jurisprudence compels us to review violations of the statutory right under Section 7B-2405 with "harmless beyond a reasonable doubt" review, which is otherwise reserved only for *preserved* constitutional errors. *See In re J.B.*, ___ N.C. App. ___, ___, 820 S.E.2d 369, 371 (2018) (holding that "failure to follow the statutory mandate when conducting an adjudication hearing constitutes reversible error unless proven to be harmless beyond a reasonable doubt").

But even based on the "harmless beyond a reasonable doubt" standard, I conclude that the inclusion of Dan and Carl's statements which suggested that penetration occurred does not justify a new hearing. Indeed, neither boy described in any detail that they saw Jeremy's penis actually penetrate Zane's anus. Dan stated that he thought Jeremy and Zane were just joking around. Carl stated that he stood away from the

action in the corner. Rather, I am convinced that the trial court made its finding regarding penetration based on the video itself, which provided no better view than the view Dan and Carl had, and based on Jeremy's own admission that he could feel his penis press against Zane's anal opening while he was thrusting, something that Carl and Dan could not see from their vantage points.

C. Attempted Larceny Admission

Sometime after the adjudication but before the disposition hearing, Jeremy allegedly stole a bicycle. At the disposition hearing, Jeremy admitted to attempting the theft, as he was caught with bolt cutters next to a bicycle. The trial court used Jeremy's admission to the attempted larceny to support its ultimate disposition.

Jeremy argues, and the majority agrees, that there was an insufficient factual basis to support the admission, and therefore the trial court should not have accepted Jeremy's admission. I disagree.

To be sure, the trial court must determine that there is a sufficient factual basis for a juvenile's admission of guilt before accepting the admission, though this factual basis may be based on statements presented by the attorneys. N.C. Gen. Stat. § 7B-2407(c) (2017); *In re C.L.*, 217 N.C. App. 109, 114, 719 S.E.2d 132, 135 (2011).

Attempted larceny requires proof that the defendant took affirmative steps, but did not succeed, to take another's property with no intent to return it. *See State v. Weaver*, 123 N.C. App. 276, 287, 473 S.E.2d 362, 369 (1996) (reciting elements of attempted larceny).

In this matter, the trial court heard a recitation of facts from the State regarding Jeremy's attempted theft of the bicycle before accepting Jeremy's admission of guilt. The recitation showed that two young males stole a bicycle using bolt cutters. Jeremy was later found by police in the company of two young males matching the description of the thieves. Jeremy admitted to knowing about the theft *and was found to be in possession of the bolt cutters which were used to facilitate the larceny*. The stolen bicycle was ultimately recovered.

I conclude that this recitation is sufficient to show that Jeremy directly participated, or at least acted in concert, in the commission of the attempted theft of the bicycle. Indeed, Jeremy's attorney and his parents each stated that Jeremy was present when the bicycle was stolen and was found in actual possession of the bolt cutters. *See State v. Agnew*, 361 N.C. 333, 336, 643 S.E.2d 581, 583 (2007) ("The [] sources

listed in [N.C. Gen. Stat. § 15A-1022(c)] are not exclusive, and therefore the trial judge may consider any information properly brought to his attention."); *In re Mecklenburg Cty.*, 191 N.C. App. 246, 248, 662 S.E.2d 570, 572 (2008) (acknowledging the parallels between N.C. Gen. Stat. §§ 7B-2407 and 15A-1022).

D. Level 3 Order

Jeremy next makes essentially three arguments with respect to his Level 3 disposition. I address each in turn.

1. Sufficiency of the Findings

First, Jeremy contends that the trial court failed to make required findings of fact as to each of the factors listed in Section 7B-2501 of our General Statutes. Whether the trial court properly complied with its statutory duty to make findings is a question of law to be reviewed *de novo*. *See In re G.C.*, 230 N.C. App. 511, 516-17, 750 S.E.2d 548, 551 (2013).

Under Section 7B-2501, the trial court is required to make findings of fact as to a number of enumerated factors regarding the best interests of the delinquent child and the protection of the public, as follows:

> (1) The seriousness of the offense;
>
> (2) The need to hold the juvenile accountable;
>
> (3) The importance of protecting the public safety;
>
> (4) The degree of culpability indicated by the circumstances of the particular case; and
>
> (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501 (2017). Further, "[t]he dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-2512 (2017). The trial court need not expressly track each of the factors enumerated in Section 7B-2501; rather, it need only enter "appropriate" findings. *Matter of D.E.P.*, ___ N.C. App. ___, ___, 796 S.E.2d 509, 516 (2017).

Here, the trial court checked form boxes indicating that the juvenile's delinquency history level was "low," and that it considered a number of reports and assessments submitted by the parties. It then added the following findings of fact in a space labeled "Other Findings:"

> Juvenile was adjudicated on a B1 felony.
>
> Juvenile's level of regulation in the short term is low.

> Juvenile continued to engage in delinquent behavior despite this pending charge (see admission to attempted larceny, date of offense 4/7/17).
>
> Juvenile requires personal accountability for his actions.
>
> Juvenile requires more structure.
>
> Juveniles [sic] [Youth Detention Center] commitment and treatment will protect the public and provide juvenile the opportunity to mature regarding opportunistic and impulsive behavior.

Jeremy cites a number of cases to show that the brevity of the trial court's findings reflects a lack of appropriate consideration for each of the required factors. *See Matter of I.W.P.*, ___ N.C. App. ___, ___, 815 S.E.2d 696, 704 (2018) (remanding for further findings where the trial court considered only three of the five factors in Section 7B-2501); *In re V.M.*, 211 N.C. App. 389, 392, 712 S.E.2d 213, 216 (2011) (reversing and remanding where the trial court's order contained insufficient findings of fact). But these cases are distinguishable from the case before us. For instance, in *In re V.M.*, the trial court checked boxes indicating receipt of the parties' documents and stated that "[t]he juvenile has been adjudicated for a violent or serious offense and Level [3] is authorized by G.S. 7B-2508," but left the "Other Findings" space blank and made no additional findings of fact at all. *In re V.M.*, 211 N.C. App. at 392, 712 S.E.2d at 215. Similarly, in *Matter of I.W.P.*, the trial court made some findings of fact but failed to make findings as to the seriousness of the juvenile's offense and his or her culpability. *Matter of I.W.P.*, ___ N.C. App. at ___, 815 S.E.2d at 704.

Here, though, not only did the trial court make multiple, additional findings of fact, but each of the five factors in Section 7B-2501 are reflected in the findings. The seriousness of the juvenile's offense is listed as commission of a B1 felony. The findings show a high need to hold the juvenile accountable, as he continues to engage in delinquent behavior and requires accountability and structure. The findings show that Jeremy's disposition will protect the public while he matures, develops personal accountability, and is prevented from continual delinquent behaviors. Jeremy's culpability is described as adjudication of a violent offense for which he exhibits concerns with personal accountability. Lastly, the order shows that the trial court considered risks and needs assessments submitted by the parties and ultimately determined that commitment with the Youth Detention Center ("YDC") would provide Jeremy an opportunity for treatment and positive growth and provide protection for the public. I conclude that the trial court's findings were "appropriate" under Section 7B-2501.

2. Sufficiency of the Evidence to Support Those Findings

Jeremy contends that the evidence did not support the trial court's findings. I conclude that the evidence supported the trial court's findings.

Jeremy scored below the median score on an Adolescent Self-regulatory Inventory assessment, showing that "his levels of self-regulation are less developed in the short-term." Further, Jeremy elected to engage in further delinquent behavior following the sexual assault. Though reports suggested that Jeremy had adequate supervision at home, there was evidence that Jeremy's mother was unaware that the assault had occurred within her home until two weeks after the event, that Jeremy was allowed to spend time with others who engaged in criminal activity, and that his mother referred to the assault as simply "kids being kids." Psychological testing showed signs of immaturity, and Jeremy's assessments concluded that his "risk factors suggest that his referring offense behaviors were opportunistic and impulsive." The assessments also reflected that Jeremy only partially expressed remorse and/or guilt for his actions. The evidence shows that removing Jeremy from his current circumstances and committing him to the YDC would allow an opportunity to grow and mature away from a potentially negative environment.

3. Sufficiency of Conclusions to Support Level 3 Disposition

Jeremy contends that he "could have received a Level 2 disposition" and that a Level 2 disposition would have been "most appropriate in this case."

"The decision to impose a statutorily permissible disposition is vested in the discretion of the juvenile court and will not be disturbed absent clear evidence that the decision was manifestly unsupported by reason." *In re K.L.D.*, 210 N.C. App. 747, 749, 709 S.E.2d 409, 411 (2011); *see* N.C. Gen. Stat. § 7B-2506 (2017).

Here, the trial court adjudicated Jeremy delinquent for commission of a Class B1 felony, and the trial court found that his delinquency history level was "low." Class B1 felonies are considered "violent" offenses, and juveniles who commit violent offenses with a "low" delinquency history may receive either a Level 2 or 3 disposition. N.C. Gen. Stat. §§ 7B-2508(a), (f) (2017). Therefore, it was within the trial court's discretion to enter a Level 3 disposition in this case. "The existence of [evidence of Jeremy's good behavior], although it might have supported a decision by the trial court to impose a Level 2 disposition, does not support a conclusion that the trial court's decision to impose a Level 3

disposition was unreasonable." *Matter of D.E.P.*, ___ N.C. App. ___, ___, 796 S.E.2d 509, 516 (2017).

E. Confinement Pending Appeal

Upon entering his appeal, Jeremy also filed a motion requesting release from the YDC while his appeal was pending. The trial court entered an order denying this motion. Jeremy contends that the trial court failed to state compelling reasons for its denial, in violation of Section 7B-2605. I disagree.[5]

Section 7B-2605 of our General Statutes states that a juvenile must be released pending appeal, unless the trial court states written, compelling reasons otherwise:

> Pending disposition of an appeal, the release of the juvenile, with or without conditions, should issue in every case unless the court orders otherwise. For compelling reasons which must be stated in writing, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.

N.C. Gen. Stat. § 7B-2605 (2017). While compelling reasons are required, the court need not be verbose. For instance, this Court has upheld denial of release pending appeal where the trial court simply listed that the defendant committed "first degree sex offenses with a child." *In re J.J.D.L.*, 189 N.C. App. 777, 781, 659 S.E.2d 757, 760-61 (2008). Most commonly, orders denying release are vacated where the trial court simply checks a box on a form in lieu of making any written findings at all. *See In re J.J., Jr.*, 216 N.C. App. at 376, 717 S.E.2d at 66.

Here, the trial court's order acknowledged in writing that Jeremy had a "lack of structure in the home" and "continued delinquent behavior

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5. The State contends that this issue is both not properly before us and also moot upon resolution of Jeremy's appeal. It is true that Jeremy has not appealed the order denying his release pending appeal, but our Court has oft reviewed this issue without a separate appeal. *See In re J.L.B.M.*, 176 N.C. App. 613, 628, 627 S.E.2d 239, 249 (2006); *In re Bass*, 77 N.C. App. 110, 117, 334 S.E.2d 779, 783 (1985). In the same respect, though his appeal will no longer be pending upon issuance of this opinion, our Court has repeatedly chosen to address this issue despite similar circumstances. *See In re J.J., Jr.*, 216 N.C. App. 366, 376, 717 S.E.2d 59, 66 (2011) (vacating an insufficient order despite "the likelihood that the passage of time may have rendered the issue of [the] juvenile's custody pending appeal moot"); *In re J.L.B.M.*, 176 N.C. App. at 628, 627 S.E.2d at 249; *In re Lineberry,* 154 N.C. App. 246, 256, 572 S.E.2d 229, 236 (2002)). In the interest of judicial economy, we reach the merits of this claim in the present appeal.

after being charged with a B1 felony." Jeremy entered an admission of guilt in regard to his subsequent delinquent behavior following his adjudication for sexual offenses. Further, the order decrees that Jeremy "shall remain in [YDC custody] pending appeal for . . . protection of the public." I conclude that the trial court's order sufficiently noted compelling reasons for Jeremy's continued confinement pending his appeal.

III. Conclusion

My vote is to affirm the order of the trial court. While I may have made different findings, there was evidence to support the findings that the trial court made. Accordingly, I dissent.

STEVE MANLEY, Personally and as Administrator of the Estate of Clarence Manley, deceased, Plaintiff

v.

MAPLE GROVE NURSING HOME, SNOWSHOE LTC GROUP, LLC, PRINCIPLE LONG TERM CARE, INC. and BRITTHAVEN, INC., Defendants

No. COA19-154

Filed 20 August 2019

Appeal and Error—notice of appeal—designation of both interlocutory order and final order—dismissal

The Court of Appeals dismissed an appeal in a civil case for lack of jurisdiction where plaintiff purported to appeal from an interlocutory order denying his motion to amend but failed to designate the final order in his notice of appeal. To properly appeal the interlocutory order, plaintiff should have designated in his notice of appeal both the interlocutory order and the final order rendering the interlocutory order reviewable. The jurisdictional deficiency required dismissal where it could not be fairly inferred from the notice of appeal that plaintiff also intended to appeal from the final order.

Appeal by Plaintiff from order entered 13 January 2017 by Judge Lindsay R. Davis, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 6 June 2019.

Schwaba Law Firm, PLLC, by Andrew J. Schwaba and Zachary D. Walton, for Plaintiff-Appellant.

Bovis Kyle Burch & Medlin, LLC, by Brian H. Alligood, for Defendants-Appellees.

COLLINS, Judge.

Plaintiff Steve Manley appeals from the trial court's 13 January 2017 order that, *inter alia*, denied his motion to amend his complaint on the grounds of futility. Because the 13 January 2017 order was interlocutory, and Plaintiff failed to appeal from the 23 October 2018 final order granting Defendants summary judgment in the case, we lack jurisdiction to hear Plaintiff's appeal. Accordingly, we dismiss Plaintiff's appeal.

I. Background

This matter arises out of an accident that took place at Defendant Maple Grove Nursing Home's facility, in which decedent Clarence Manley ("Decedent") fell and injured himself, an injury that allegedly led to his death on 30 December 2014.

Plaintiff, as Administrator of Decedent's estate, filed a so-called John Doe action on 11 April 2016 seeking subpoena power to investigate Decedent's fall and alleging negligence in connection therewith. On 19 May 2016, Plaintiff amended his complaint to bring causes of action for common law breach of fiduciary duty and professional negligence against Defendants Maple Grove Nursing Home; Snowshoe LTC Group, LLC; Principle Long Term Care, Inc.; and Britthaven, Inc. (collectively, "Defendants"). Defendants filed an answer to the amended complaint on 25 July 2016, and therein: (1) generally denied Plaintiff's allegations; (2) moved to dismiss the amended complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 9(j), 12(b)(1), and 12(b)(6); and (3) asserted defenses of contributory negligence and satisfaction of Plaintiff's requests for the production of Decedent's medical records.

Plaintiff filed a motion to amend the complaint on 19 December 2016, and a supplemental motion to amend the complaint on 22 December 2016 (collectively, the "Motion to Amend"). In the Motion to Amend, Plaintiff: (1) argued that Defendants have failed to provide document discovery sufficient for Plaintiff to prosecute his case, and moved to compel the production of the allegedly-withheld documents; and (2) asserted that he had retained an expert who had concluded that malpractice had occurred and that he sought to add a cause of action for "nursing home malpractice" to the second amended complaint. Plaintiff attached the proposed second amended complaint reflecting the proposed cause of action for malpractice to his Motion

to Amend, which included a certification of compliance with N.C. Gen. Stat. § 1A-1, Rule 9(j).[1]

On 13 January 2017, the trial court entered an order denying Plaintiff's Motion to Amend.[2] In its 13 January 2017 order, the trial court noted that neither the original nor the amended complaint contained or was accompanied by a certification of compliance with Rule 9(j). The trial court denied Plaintiff's Motion to Amend on the grounds of futility because: (1) the statute of limitations for bringing a cause of action for wrongful death had expired such that a pleading could not be amended to add a new cause of action for medical malpractice; and (2) to the extent the original or amended complaints stated a cause of action for medical malpractice, those pleadings were deficient for failure to include a Rule 9(j) certification.

On 14 August 2018, Defendants moved pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, for summary judgment on Plaintiff's amended complaint. Plaintiff responded on 22 October 2018.

On 23 October 2018, Superior Court Judge R. Stuart Albright entered an order granting Defendants' motion for summary judgment. On 20 November 2018, Plaintiff filed a Notice of Appeal that "gives notice of appeal to the North Carolina Court of Appeals from the Order denying the Plaintiff's Motion to Amend the Complaint, entered by the Honorable Lindsay R. Davis, Jr. on January 13, 2017[.]"

II. Discussion

Before we hear an appeal, we must first determine that we have jurisdiction to do so.

Rule 3 of the North Carolina Rules of Appellate Procedure governs the procedure for taking an appeal in a civil matter. The first step in taking an appeal is the filing and service of a proper notice of appeal within a specified time period following the entry of judgment against the appellant. *See* N.C. R. App. P. 3 (2018). Appellate Rule 3(d) sets forth the required contents of a notice of appeal, and specifically requires

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1. In relevant part, Rule 9(j) requires dismissal of a complaint alleging medical malpractice against a health care provider unless the complaint contains a specific assertion that a reasonably-anticipated expert witness has reviewed "the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry" and "is willing to testify that the medical care did not comply with the applicable standard of care[.]" N.C. Gen. Stat. § 1A-1, Rule 9(j) (2016).

2. The trial court also denied Plaintiff's motion to compel further document production in its 13 January 2017 order.

an appellant to "designate the judgment or order from which appeal is taken[.]" *Id.*

"[A]ppeal lies of right directly to the Court of Appeals . . . [f]rom any final judgment of a superior court." N.C. Gen. Stat. § 7A-27(b)(1) (2018). The trial court's 23 October 2018 order granting Defendants' motion for summary judgment was a final judgment of a superior court. *Green v. Dixon*, 137 N.C. App. 305, 310, 528 S.E.2d 51, 55 (2000) ("[A] cause of action determined by an order for summary judgment is a final judgment on the merits.").

As detailed above, in his Notice of Appeal, Plaintiff purported to appeal from the trial court's 13 January 2017 order denying Plaintiff's Motion to Amend. But other than in circumstances which this case does not present,[3] "[a]n order denying a motion to amend pleadings is an interlocutory order, and is not immediately appealable." *Carter v. Rockingham Cty. Bd. of Educ.*, 158 N.C. App. 687, 689, 582 S.E.2d 69, 71 (2003) (quotation marks and citation omitted). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). On the other hand, "[a] final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Id.* at 361-62, 57 S.E.2d at 381.

Plaintiff gained the right to appeal from prior interlocutory orders in the case (such as the 13 January 2017 order) once the 23 October 2018 order granting Defendants summary judgment was entered, as the 23 October 2018 order disposed of the case entirely and left nothing to be judicially determined by the trial court. *See Love v. Moore*, 305 N.C. 575, 578, 291 S.E.2d 141, 144 (1982) ("An interlocutory decree . . . is reviewable only on appropriate exception upon an appeal from the final judgment in the cause."); N.C. Gen. Stat. § 1-278 (2018) ("Upon an appeal from a [final] judgment, the court may review any intermediate order

3. Our Supreme Court has said that "immediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay [pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b)]. . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a 'substantial right'" within the meaning of N.C. Gen. Stat. §§ 1-277 or 7A-27. *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (citations omitted). No Rule 54 certification is reflected in the record, and Plaintiff nowhere argues that the trial court's denial of his Motion to Amend affected a substantial right within the meaning of N.C. Gen. Stat. §§ 1-277 or 7A-27.

involving the merits and necessarily affecting the judgment."). But in order to properly appeal an interlocutory order, an appellant must designate both the interlocutory order and the final judgment rendering the interlocutory order reviewable in its notice of appeal, since "the appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken." *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994).

Plaintiff did not designate the 23 October 2018 order in his Notice of Appeal, which is a jurisdictional deficiency requiring dismissal of his appeal. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) ("A jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal."); *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) ("Without proper notice of appeal, this Court acquires no jurisdiction." (quotation marks and citation omitted)).

This Court has said that "a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake." *Von Ramm*, 99 N.C. App. at 156-57, 392 S.E.2d at 424 (emphasis in original) (quotation marks and citation omitted). But as in *Von Ramm*—where this Court held that a defendant's notice of appeal from an order denying his motion to set aside a final judgment did not allow the Court to fairly infer that defendant also intended to appeal the underlying judgment—we hold that an intent to appeal from the 23 October 2018 order cannot be fairly inferred from Plaintiff's Notice of Appeal. *Id.*

We accordingly conclude that we have not acquired jurisdiction to hear Plaintiff's appeal.

III. Conclusion

Because Plaintiff failed to comply with Appellate Rule 3 as required, we have no jurisdiction to hear Plaintiff's appeal. We thus dismiss Plaintiff's appeal.

DISMISSED.

Judges STROUD and ARROWOOD concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., PLAINTIFF
v.
WILLIAM THOMAS DANA, JR., INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF PAMELA MARGUERITE DANA, DEFENDANTS

No. COA18-1056

Filed 20 August 2019

Motor Vehicles—insurance—underinsured motorist coverage—multiple claimants—per-accident cap

Plaintiff-insurer was liable to pay defendants (a husband and his deceased wife, who was the named insured of a personal automobile policy issued by plaintiff) pursuant to the per-accident cap in their insurance agreement where the parties stipulated that underinsured motorist (UIM) coverage was available to defendants, there were two claimants (defendants) seeking coverage under the UIM policy, and the negligent driver's liability policy was exhausted pursuant to a per-accident cap.

Appeal by Plaintiff from Order entered 2 August 2018 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 24 April 2019.

William F. Lipscomb for plaintiff-appellant.

Maynard & Harris Attorneys at Law, PLLC, by C. Douglas Maynard, Jr. and Sarah I. Young, for defendants-appellees.

MURPHY, Judge.

When a court is tasked with determining what amount, if any, of underinsured motorist ("UIM") coverage is available, it must determine whether UIM coverage is available at all, and, if so, how much the insured party or parties are entitled to receive in light of: (1) the number of claimants seeking coverage under the UIM policy and (2) whether the negligent driver's liability policy was exhausted pursuant to a per-person or per-accident cap. Here, the parties stipulated that UIM coverage is available to the Defendants. Additionally, there are two claimants seeking coverage under the UIM policy, and the negligent driver's liability was exhausted pursuant to a per-accident cap. Accordingly, we must hold that Plaintiff, North Carolina Farm Bureau Mutual Insurance Company, Inc., is obligated to pay the Defendants pursuant to the per-accident cap

in the parties' insurance agreement. The trial court's grant of summary judgment in favor of the Defendants is affirmed.

BACKGROUND

This is a declaratory judgment action regarding the extent of Plaintiff's liability to Defendants stemming from an automobile accident in which Defendant William Thomas Dana ("Mr. Dana") was injured and his wife ("Ms. Dana")—whose estate he represents in this suit—was killed. Ms. Dana was the named insured of a personal auto insurance policy issued by Plaintiff that covered the vehicle involved in the crash and provided UIM coverage in the amounts of $100,000.00 per-person and $300,000.00 per-accident. The other driver involved in the collision was represented by Integon Insurance and had liability coverage up to $50,000.00 per-person and $100,000.00 per-accident.

After the accident, Integon agreed to pay out the full $100,000.00 per-accident limit, divided equitably among the four parties involved in the accident, with Mr. Dana receiving $32,000.00 and Ms. Dana's estate receiving $43,750.00. In accordance with the per-person limits in Ms. Dana's insurance agreement, Plaintiff paid Mr. Dana $68,000.00 ($100,000.00 per-person UIM limit less the $32,000.00 paid by Integon) and Ms. Dana's estate $56,250.00 ($100,000.00 less the $43,750.00 paid by Integon).

At trial, Defendants successfully argued that, because the liability policy limits of Integon were exhausted on a per-accident basis, they are entitled to a total of $200,000.00 of UIM coverage from Plaintiff (the $300,000.00 per-accident limit less $100,000.00 paid by Integon). Plaintiff contends Defendants have already received the maximum amount of UIM coverage available under the policy in question. Both parties moved for summary judgment, which was granted for the Defendants rendering Plaintiff liable for an additional $75,750.00 of UIM coverage ($200,000.00 unpaid coverage less $68,000.00 to Mr. Dana and $56,250.00 paid to Ms. Dana). Plaintiff filed timely notice of appeal.

ANALYSIS

Our job on appeal is to determine whether the trial court was correct in determining, as a matter of law, that "[p]er the holding in [*N.C. Farm Bureau Mut. Ins. Co. v. Gurley, et. al.*, 139 N.C. App. 178, 532 S.E.2d 846 (2000)], the underlying policy in this matter was exhausted on a per-accident basis, requiring the applicability of the per-accident underinsured limits for the Defendants' claims." In reviewing a trial court's decision to grant or deny summary judgment, our standard is de novo. *In re Will of*

Jones, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is appropriate "only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Id.* (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (internal quotation marks omitted)). Because the parties stipulated to the relevant facts of this case, there are no genuine issues of material fact. After careful review, we conclude Defendant was entitled to a judgment as a matter of law and the trial court did not err in granting Defendant summary judgment.

In *Gurley*, we established a straightforward analysis to determine in what amount, if any, UIM coverage is available, given both the insurance policy in question and our UIM statute, N.C.G.S. § 20-279.21(b) (2017). *Gurley*, 139 N.C. App. at 180, 532 S.E.2d at 848. Initially we must determine whether UIM coverage is available. *Id.* If UIM coverage is available, we next ascertain "how much coverage the insureds are entitled to receive under the UIM policy." *Id.* To decide how much coverage the insured party or parties are entitled to, we must consider "(1) the number of claimants seeking coverage under the UIM policy; and (2) whether the negligent driver's liability policy was exhausted pursuant to a per-person or per-accident cap." *Id.* at 181, 532 S.E.2d at 848.

> [W]hen more than one claimant is seeking UIM coverage, as is the case here, how the liability policy was exhausted will determine the applicable UIM limit. In particular, when the negligent driver's liability policy was exhausted pursuant to the per-person cap, the UIM policy's per-person cap will be the applicable limit. However, when the liability policy was exhausted pursuant to the per-accident cap, the applicable UIM limit will be the UIM policy's per-accident limit.

Id. at 181, 532 S.E.2d at 849.

Since the parties stipulated that UIM coverage is available to Mr. Dana and Ms. Dana's estate, we need only determine how much coverage the insured parties are entitled to receive. Applying the facts of this case to the *Gurley* framework is not difficult: there are multiple claimants (Mr. Dana and the Estate of Ms. Dana) seeking coverage under the UIM policy in question and the negligent driver's liability policy was exhausted pursuant to a per-accident cap. Accordingly, *Gurley* mandates the Defendants are collectively entitled to receive coverage pursuant to the per-accident cap of $300,000.00. We affirm the trial court's grant of summary judgment in favor of the Defendants.

CONCLUSION

The parties to this appeal have stipulated that UIM coverage is available to Defendants. There are two claimants seeking coverage under the UIM policy, and the negligent driver's liability was exhausted pursuant to a per-accident cap. Accordingly, *Gurley* controls and we must hold the Defendants are entitled to be paid pursuant to the per-accident cap in the parties' insurance agreement.

AFFIRMED.

Judges DILLON and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
KENNETH RUSSELL ANTHONY

No. COA18-1118

Filed 20 August 2019

Satellite-Based Monitoring—lifetime—reasonableness—risk of recidivism—efficacy—evidence required

The trial court's order imposing lifetime satellite-based monitoring (SBM) was reversed where the State provided no evidence about defendant's risk of recidivism or the efficacy of SBM to accomplish reducing that risk that would support a reasonableness determination as applied to defendant. The State's contention that the trial court took judicial notice of the studies and statistics cited during argument was not supported by the record—the studies were not presented as evidence, the State did not request judicial notice, and the court did not indicate it was taking judicial notice.

Appeal by defendant from order entered on 26 April 2018 by Judge Lori I. Hamilton in Superior Court, Rowan County. Heard in the Court of Appeals 8 May 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

STROUD, Judge.

Defendant appeals from an order imposing lifetime satellite-based monitoring ("SBM"). Although the State presented argument to the trial court regarding the risk of recidivism by sex offenders based upon various studies and statistics, the State did not provide the studies to Defendant or the trial court. The statistics noted by the State were not subject to judicial notice under Rule 201 since they are subject to reasonable dispute and they are not "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201(b) (2017). Since the State presented no evidence supporting the reasonableness of SBM as applied to Defendant, we must reverse the trial court's order for the reasons discussed in *State v. Grady*, ___ N.C. App. ___, 817 S.E.2d 18 (2018) ("*Grady II*"), and *State v. Griffin*, ___ N.C. App. ___, 818 S.E.2d 336 (2018).

I. Background

Defendant entered an *Alford* plea to attempted first-degree sex offense, habitual felon, assault on a female, communicating threats, interfering with emergency communication, first-degree kidnapping, incest, and second-degree forcible rape. Defendant's charges were consolidated into a single judgment and the trial court imposed a sentence of 216 to 320 months. On the same day judgment was entered, Defendant submitted a motion to dismiss the State's petition for SBM. The trial court held a hearing regarding SBM. The trial court denied Defendant's motion and entered an order directing Defendant to submit to lifetime SBM upon his release from prison. Defendant timely appealed the order requiring him to submit to lifetime SBM.

II. Standard of Review

"An appellate court reviews conclusions of law pertaining to a constitutional matter de novo." *Grady II*, ___ N.C. App. at ___, 817 S.E.2d at 21 (quoting *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010)).

III. Evidence of Reasonableness of SBM

Defendant argues "[b]ecause the State in this case failed to satisfy its burden of demonstrating that SBM was a reasonable search, the order requiring Mr. Anthony to submit to lifetime SBM must be reversed without remand to superior court." Defendant also argues that "North Carolina's SBM program is an unreasonable search that violates the Fourth Amendment."

Once the trial court has determined that a defendant is subject to SBM under North Carolina General Statute § 14-208.40(a)(1)-(3), it must then determine the constitutionality of the search as applied to the particular defendant. *Grady II*, ___ N.C. App. at ___, 817 S.E.2d at 28 ("We reiterate the continued need for individualized determinations of reasonableness at *Grady* hearings."). This analysis includes two parts: the defendant's risk of recidivism and the efficacy of SBM to accomplish a reduction of recidivism. *See id.* at ___, 817 S.E.2d at 27. Even if we assume for purposes of argument that sex offenders have a higher risk of recidivism than those convicted of other crimes, the State still must address whether SBM is actually effective to prevent recidivism for that defendant.

At the hearing, the only evidence the State presented was "bills that the victim received for medical treatment, an order of evidence to destroy some evidence, two proposed form 615s for the registration and satellite-based monitoring, and two proposed permanent no-contact orders for the two victims."[1] As part of its argument, the State's counsel noted various studies and statistics:

> [T]here are some statistics I do want to recite for the Court so you can consider in your finding that this is reasonable search in this case. The United States Department of Justice, Office of Just Programs -- I'm referencing the office of sex offender sentencing, monitoring, apprehending, registering and tracking a research brief that was done by Louise DeBaca, D-e-B-a-c-a, he's a director, on July of 2015.

The State then discussed various studies and statistics but did not provide the trial court or defense counsel with these studies, nor are they in the record on appeal.

Much of the State's brief focuses on the portion of the hearing regarding Defendant's plea and its factual basis, but there is no issue regarding defendant's *Alford* plea or his convictions. After entry of the plea and sentencing, the trial court considered the State's petition for SBM and Defendant's motion to dismiss the petition. But the State presented no evidence as to the reasonableness of SBM. Instead, the State presented only argument opposing defendant's motion to dismiss and supporting its petition for SBM. In the argument, the State referred to various

1. The State presented this evidence during the portion of the hearing dealing with the plea and sentencing, but the trial court heard the SBM issues in the same hearing. The State did not present any additional evidence during the portion of the hearing regarding SBM.

studies and statistics on recidivism by sex offenders, but the State did not attempt to present any evidence or request judicial notice of any studies *regarding the actual efficacy of its SBM program in preventing recidivism*. Even if we assume sex offenders in general do have a higher rate of recidivism than those convicted of other crimes, and even if a defendant in particular has an increased likelihood of reoffending, if there is no evidence that SBM actually prevents recidivism, the State cannot show that imposing a continuous, life-time search is reasonable under the Fourth Amendment of the United States Constitution.

The State argues this case differs from *Griffin* because here the trial court took judicial notice of studies referenced by the State at trial. In *Griffin*, the State stresses that it did not present any evidence on the "efficacy of the SBM program." *Griffin*, ___ N.C. App. at ___, 818 S.E.2d at 340. In its brief, the State argues:

> Defendant also takes exception to the fact the State relied upon statistics from studies in its argument on the efficacy of SBM. However, at no point either during the hearing or in its memorandum did he object to the State's ability to raise those statistics. Instead, Defendant argued about the constitutionality of SBM on the basis of fees, the ability to travel, the burden of proof, and the ability to seek termination.
>
> However, on appeal, the basis for his argument about the statistics stems from this Court's decision in Griffin, namely that in relying upon a decision from the Fourth Circuit Court of Appeals, this Court reasoned, "Decisions from other jurisdictions relied upon by our dissenting colleague—and by the State—holding that SBM is generally regarded as effective in protecting the public from sex offenders are not persuasive;" and also the State did not attach the empirical or statistical reports to its memorandum. Understanding of course that this Court cannot overturn itself, it is therefore relevant that notwithstanding the lack of a bright-line test in Grady II, neither the State nor Defendant's trial court had the benefit of either Grady II or Griffin when addressing the reasonableness of SBM as it relates to Defendant.
>
> Even so, *the State did not simply argue about other cases, it argued about actual studies. While the State did not appear to have introduced the physical research, seeing as the information about the studies came from*

> *a well-known source*, *the United States Department of Justice*, the court was within its right to take judicial notice of the studies. See Khaja v. Husna, 243 N.C. App. 330, 353, 777 S.E.2d 781, 794 (2015) (quoting N.C.G.S. § 8C-1, Rule 201)(holding that a court may take judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. . . . A court may take judicial notice, whether requested or not.").

(Emphasis added) (citations omitted.) Therefore, the State's argument relies upon the contention that the trial court took judicial notice of the studies and statistics noted in its argument to the trial court, despite the fact that (1) the studies were not presented to defendant or the trial court; (2) the State did not request judicial notice; and (3) the trial court made no indication it was taking judicial notice of the studies. The State also contends that Defendant waived any argument regarding judicial notice of the studies by his failure to object, but since the State did not present the studies to the trial court or request that the trial court take judicial notice of them, defendant had no opportunity to object to judicial notice.

Judicial notice is governed by Rule 201 of the North Carolina Rules of Evidence:

> (b) **Kinds of facts.** — A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> (c) **When discretionary.** — A court may take judicial notice, whether requested or not.
>
> (d) **When mandatory.** — A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> (e) **Opportunity to be heard.** — In a trial court, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

N.C. Gen. Stat. § 8C-1, Rule 201.

Defendant argues that the trial court could not take judicial notice under Rule 201 of the State's "purported studies" for several reasons. First, the State presented no evidence of the studies to the trial court. "[I]t is axiomatic that the arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996). In addition, Defendant notes that the risk of recidivism by sex offenders is subject to extensive reasonable debate and this debate has been noted by our Court.

> As the State itself acknowledges, a court can only take judicial notice of a fact whose accuracy "cannot reasonably be questioned." State's Brief, p. 20 (quoting Rule 201 of the North Carolina Rules of Evidence). Indeed, the State itself relies on *Khaja v. Husna*, 243 N.C. App. 330, 354, 777 S.E.2d 781, 794 (2015), which makes clear that "[a]ny subject . . . that is open to reasonable debate is not appropriate for judicial notice." Here, the results of the purported studies relied on by the State are subject to reasonable debate.
>
> As this Court has itself observed, there are multiple State and federal reports that counter the "widely held assumption that sex offenders recidivate at higher rates than other groups." *State v. Grady*, ___ N.C. App. ___, ___, 817 S.E.2d 18, 27-28 (2018). For example, a study of the Bureau of Justice Statistics found that "state prisoners in general had almost a one in two chance of a new conviction . . . ." Chrysanthi Leon et al, *Net-widening in Delaware: The Overuse of Registration and Residential Treatment for Youth Who Commit Sex Offenses*, 17 Widener L. Rev. 127, 145 (2011). Of the released sex offenders, "the sex offense recidivism rate was only 5.3% over the three-year follow-up period." *Id.* Ultimately, because there is no consensus on recidivism rates among sex offenders, it is improper for the State to use judicial notice to establish such recidivism rates.

(Alterations in original).

This Court noted in *Grady II* that the defendant had "presented multiple reports authored by the State and federal governments rebutting the widely held assumption that sex offenders recidivate at higher rates than other groups." ___ N.C. App. at ___, 817 S.E.2d at 27-28. Our SBM statutes themselves also recognize that rates of recidivism vary for different classes of offenders and offenses, as the STATIC 99 evaluates the level

of the risk of reoffending based upon the type of offense and characteristics of the particular defendant. *See* N.C. Gen. Stat. § 14-208.40A (2017).

At trial, the State described statistics and studies to support its position that Defendant's risk of recidivism was higher because of his status as a sex offender.[2] But the studies were not presented to Defendant or the trial court, and there is no indication in our record or the transcript that the State requested or that the trial court actually took judicial notice. And as we have already noted, the studies the State relied upon were not included in the record on appeal.

Defendant also argues that if the trial court could have taken judicial notice of the studies and statistics argued by the State, the State still presented no evidence of the efficacy of SBM. The statistics noted by the State addressed only the risk of recidivism, but this is just one part of the determination of the reasonableness of SBM. Defendant argues, and we agree, that the State presented no evidence on the second part of the analysis of the reasonableness of SBM—whether SBM is actually effective to prevent recidivism:

> Further, the studies recited by the prosecutor did not indicate that SBM would prevent Mr. Anthony himself from committing sex crimes upon his release from prison. As explained in *Riley*, it is insufficient for the State to merely assert its interest in a search. Any warrantless search must actually further the interest claimed. Here, the State failed to produce any evidence that SBM was a valuable law enforcement tool or that it had ever prevented the commission of a crime. It likewise did not put on any evidence that Mr. Anthony, who will be 68-years old when he is released from prison, actually will present a risk to public safety at that time.

(Citation and emphasis omitted.)

The State's attempt to distinguish this case from prior SBM cases where the State presented no evidence to support the reasonableness of SBM fails. The trial court did not take judicial notice of the studies mentioned by the State in argument, nor could it have taken judicial notice under Rule 201. The studies were not offered into evidence or even presented to defendant or the trial court but only discussed in argument. Even assuming arguendo that making an argument based upon a study

2. During the hearing the State informed the trial court "I'll be reciting some of the statistics, but I don't have anything to present[,]" and the trial court responded, "Okay."

or statistics to a trial court could enable judicial notice, statistics or studies on the effectiveness of SBM are neither "generally known within the territorial jurisdiction of the trial court" nor "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.* And again, the State presented no evidence regarding the *efficacy* of SBM.

IV. Conclusion

While defendant has facially challenged the constitutionality of North Carolina's SBM program, we decline to address this argument as the order requiring Defendant to submit to SBM was unreasonable as applied to him and must be reversed. Despite the State's attempt to distinguish this case from others where this Court has overturned SBM orders, we conclude that the statistics and studies mentioned by the State in its argument were not subject to judicial notice under Rule 201. In addition, the State presented no evidence on whether SBM is actually effective to prevent recidivism. Accordingly,

> [w]e also are bound by this Court's holding in *Grady II* that when the State has presented no evidence that could possibly support a finding necessary to impose SBM, the appropriate disposition is to reverse the trial court's order rather than to vacate and remand the matter for re-hearing.

Griffin, ___ N.C. App. at ___, 818 S.E.2d at 342. The trial court's order imposing lifetime SBM is reversed.[3] As has been noted by other SBM cases, we emphasize that the State has preserved its arguments for review pending the outcome of the SBM cases with the Supreme Court of North Carolina.

REVERSED.

Judges HAMPSON and YOUNG concur.

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3. The parties disagree about the proper mandate given this Court's mandates in *State v. Greene*, ___ N.C. App. ___, 806 S.E.2d 343 (2017) (reversing the SBM order), and *State v. Gordon*, ___ N.C. App. ___, 820 S.E.2d 339 (2018) (vacating the SBM order), among other cases. Because "the State will have only one opportunity to prove that SBM is a reasonable search of the defendant[,]" *Grady II*, ___ N.C. App. at ___, 817 S.E.2d at 28, and, in this case, where the trial court held a hearing on SBM, considered the constitutionality of enrolling Defendant in SBM when the State referenced statistics and studies in support of its position, and denied Defendant's motion to dismiss, it is appropriate to reverse the trial court's order requiring Defendant to enroll in lifetime SBM.

STATE OF NORTH CAROLINA
v.
NICHOLAS OMAR BAILEY, DEFENDANT

No. COA18-1187

Filed 20 August 2019

Search and Seizure—search warrant application—affidavit—probable cause—nexus between location and illegal activity

In a prosecution for drug trafficking, defendant was not entitled to the suppression of cocaine and drug paraphernalia found at an apartment where facts in the affidavit submitted with the search warrant application, along with inferences that could reasonably be drawn from those facts, indicated a fair probability that evidence of an illegal drug transaction would be found at that location. Although the drug transaction was observed elsewhere, law enforcement followed a vehicle occupied by known drug dealers directly back to the apartment from the place of the drug exchange, thereby providing a direct connection between the apartment and the illegal activity, and a substantial basis from which to make a probable cause determination.

Judge ZACHARY dissenting.

Appeal by defendant from judgment entered 10 July 2018 by Judge Charles H. Henry in Carteret County Superior Court. Heard in the Court of Appeals 11 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Jessica Macari, for the State.

Richard Croutharmel for defendant-appellant.

BERGER, Judge.

Nicholas Omar Bailey ("Defendant") appeals from a judgment entered upon his guilty plea to trafficking in cocaine, following the trial court's denial of his motion to suppress. Because the magistrate had a substantial basis to find probable cause, we affirm the trial court's order denying Defendant's motion to suppress.

Factual and Procedural Background

On April 25, 2017, Detective Dallas Rose ("Detective Rose") with the Carteret County Sheriff's Department applied to a magistrate for a warrant to search the residence belonging to Brittany Tommasone ("Tommasone") and James White ("White") located at 146 E. Chatham Street, Apartment #1, Newport, North Carolina; any individual located at that location during the execution of the search warrant; and any vehicle at that location, including a blue Jeep Compass. Detective Rose, after being duly sworn, stated in his application that there was probable cause to believe "[h]eroin, scales, paraphernalia, packaging equipment, videos, photos, ledgers and documents" related to illegal narcotics would be found at the named location.

Detective Rose provided information concerning his training and experience as a law enforcement officer for twelve years. Specifically, Detective Rose swore that he

> has been a Deputy Sheriff for 9 years and has been a Police K-9 Handler for 6 years with the Carteret County Sheriff's Office. The affiant also was a Police Officer for the Morehead City Police Department for 3 years. The affiant is currently assigned as a Detective with the Carteret County Sheriff's Office Narcotics Unit. The Affiant has been employed with the Carteret County Sheriff's Office since January 2006. The Affiant has received training in the field of Narcotics Investigations and Criminal Interdiction Enforcement from Carteret and Craven Community College and other private and public training conferences and seminars. The Affiant has conducted and assisted in numerous criminal and narcotic investigations leading to arrests and convictions in [ ] trafficking different types of illegal narcotics, as well as crimes against persons, property crimes, both felony and misdemeanor.

Detective Rose then provided a statement of facts establishing probable cause as follows:[1]

> On 04/25/2017 at approximately 5:35 pm Detectives with the Carteret County Sheriff's Office, Jones County Sheriff's Office, and Havelock Police Department were conducting visual surveillance of a parking lot area located at 900 Old Fashioned Way in Newport, North Carolina.

1. Text has been modified to include paragraph breaks for ease of reading.

The name of the Apartment Complex is Compass Landing Apartments. During surveillance of the parking lot area Affiant of the Carteret County Sheriff's Office observed a blue in color Jeep Compass bearing a North Carolina Registration of "BRITCP" arrive in the parking lot area and park.

Affiant observed the occupants of the vehicle to be Brittany Elizabeth Tommasone as the driver and James Edward White Jr. as the front seat passenger of the vehicle. Affiant is familiar with Brittany Tommasone and James White Jr. from past dealings related to drug activity[,] including the sale of [i]llegal [n]arcotics. Affiant also had recent knowledge from 04/24/2017 that Britt[an]y Tommasone and James White Jr. were not residing at Compass Landing Apartments and have established a residence at 146. E. Chatham Street in Newport, North Carolina according to Brittany Tommaso[n]e and James White Jr.

Once the vehicle parked, Affiant observed a white female exit the passenger seat of a white in color Mercury Milan bearing a North Carolina Registration of "DCP-1384." Once the white female exited the vehicle the female walked and entered the blue in color Jeep. After approximately thirty seconds the same female that recently entered the blue in color [J]eep exited the blue in color [J]eep and walked back to the original vehicle the female subject exited from which was the white in color Mercury passenger vehicle. Once the female subject entered the white in color Mercury passenger vehicle the vehicle began exiting the parking lot area along with the blue Jeep Compass that was occupied by Brittany Tommasone and James White Jr. There were no other occupants in the Jeep that were observed by Affiant. In Affiant's training and experience the actions observed by the occupants of the two vehicles were consistent with that of a [d]rug [d]eal.

The facts that support the observation are the secluded location where the subjects met, previous knowledge of James White Jr. and Brittany Tommasone as participants in the active selling of illegal [n]arcotics, drug complaints the Carteret County Sheriff's Office had received about James White Jr. and Britt[an]y Tommaso[n]e, and the

duration of time spent inside of the Jeep once the female subject entered the Jeep from the time the female subject exited the Jeep. The two vehicles were traveling at a high rate of speed as the two vehicles were trailering one another out of the parking lot area.

Once exiting the parking lot area both vehicles made a left hand turn near the Dollar General and began traveling towards US-70. Once approaching US-70 both vehicles turned right onto US-70 and began traveling east bound on US-70 still trailering one another. As both vehicles approached the intersection of US-70 and 9 Foot Road both vehicles merged into the left hand turning lane which merges from US-70 to Howard Blvd. Once the directional signal turned green the Jeep continued onto Howard Blvd. as the white in color Mercury made a U-Turn and began traveling west bound on US-70 towards Havelock.

Affiant followed the white in color Mercury car on US-70 into Havelock where the vehicle made several lane changes without giving a turn signal. Detective Corey radioed to Affiant stating that the blue in color Jeep had driven back to 146 E. Chatham Street [A]partment 1[,] and that both occupants had exited the vehicle and entered the residence.

Detective Moots had caught up to Affiant by this time and also observed several traffic violations made by the white Mercury vehicle and activated his emergency equipment on US-70 near McDonald's pva. The Mercury put on brakes as Detective Moots had activated his emergency equipment and slowly began to stop but continued rolling forward. Once the vehicle came to a complete stop on Webb Blvd just west of McDonald[']s Restaurant[,] Detective Moots, Henderson[,] and Affiant approached the vehicle and Affiant came into contact with the passenger later identified as Autumn Lynn Taylor as the front seat passenger and Allen Dellacava as the driver of the vehicle.

Affiant requested Autumn Taylor to exit the vehicle in which she complied. Once Autumn Taylor exited the vehicle Affiant asked who she had just met with in which Autumn Taylor replied James White. Affiant then asked Autumn Taylor if she had just recently purchased Heroin from James White due to the recent observations

> observed in the Compass Landing parking lot area. Autumn Taylor responded that she purchased a twenty dollar bag of Heroin and snorted while traveling down the road and once finished she threw the Heroin baggie out the window. Detective Henderson was speaking with Dellacava during this time along with Detective Moots as Dellacava had already been requested to exit the vehicle and was explained the reasoning for the stop. Verbal consent was given by Dellacava to search Dellacava's person and Dellacava's vehicle in the presence of Detective Moots and Detective Henderson. During the duration of search of the vehicle[,] a Springfield XD 45 Caliber was located in the glove compartment area of the vehicle and was secured. After a short roadside inquiry[,] both occupants were released with strong reprimand and warning from Detective Henderson. Detective Henderson also informed Dellacava of the concealed weapon violation and the custody of the handgun was given back to Dellacava.

The search warrant was issued, and the search was conducted that same night. Tommasone, White, and Defendant were in the residence at that time. More than 41 grams of cocaine were seized from Defendant, along with drug paraphernalia, and approximately $900 in US Currency.

Defendant was indicted on October 9, 2017 for trafficking in cocaine. On July 3, 2018, Defendant filed a motion to suppress in which he argued the facts alleged in the affidavit were insufficient to support a finding of probable cause to obtain a search warrant for the Chatham Street Apartment. The trial court denied Defendant's motion to suppress, concluding the facts alleged in the affidavit were sufficient to support a finding of probable cause to issue a search warrant for the Chatham Street residence.

Defendant pleaded guilty to trafficking in cocaine while preserving his right to appeal the trial court's denial of his motion to suppress. The trial court sentenced Defendant to 35 to 51 months in prison and ordered him to pay a $50,000.00 fine. Defendant appeals, arguing that the trial court erred in denying his motion to suppress. Specifically, Defendant contends that the sworn affidavit provided by Detective Rose did not provide probable cause to issue the search warrant. We disagree.

Standard of Review

> A reviewing court is responsible for ensuring that the issuing magistrate had a substantial basis for concluding

> that probable cause existed. Our Supreme Court has stated, "the applicable test is whether, given all the circumstances set forth in the affidavit before the magistrate, . . . there is a fair probability that contraband . . . will be found in a particular place."

State v. Frederick, ___ N.C. App. ___, ___, 814 S.E.2d 855, 858 (*purgandum*), *aff'd*, ___ N.C. ___, 819 S.E.2d 346 (2018).

Analysis

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Probable cause does not require absolute certainty. *State v. Campbell*, 282 N.C. 125, 129, 191 S.E.2d 752, 755 (1972). Rather, "[p]robable cause . . . means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender." *Id.* at 128-29, 191 S.E.2d at 755 (citation omitted).

However, the allegations made in an affidavit supporting issuance of a search warrant requires only that the magistrate determine "there is a 'fair probability' that contraband will be found in the place being searched." *State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015) (citations omitted). "The quantum of proof required to establish probable cause is different than that required to establish guilt." *Frederick*, ___ N.C. App. at ___, 814 S.E.2d at 858 (citing *Draper v. United States*, 358 U.S. 307, 311-12 (1959)). "Probable cause requires . . . only *a probability or substantial chance* of criminal activity." *McKinney*, 368 N.C. at 165, 775 S.E.2d at 825 (citation and quotation marks omitted). Probable cause is a flexible standard that is based upon the totality of the circumstances. *State v. Zuniga*, 312 N.C. 251, 260-62, 322 S.E.2d 140, 146 (1984).

Moreover, determination of probable cause permits a "magistrate to draw 'reasonable inferences' from the evidence . . . ." *McKinney*, 368 N.C. at 164, 775 S.E.2d at 824 (citation omitted). An inference of criminal activity is to be based upon "the factual and practical considerations of

everyday life on which reasonable and prudent men, not legal technicians, act." *State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)). The facts alleged in the affidavit need only "fit together well and yield a fair probability that a police officer executing the warrant will find contraband or evidence of a crime at the place to be searched . . . ." *State v. Allman*, 369 N.C. 292, 294, 794 S.E.2d 301, 303 (2016).

When reviewing an affidavit for a search warrant, a reviewing court should accord "great deference . . . [to] a magistrate's determination of probable cause and . . . after-the-fact scrutiny should not take the form of a *de novo* review." *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 258 (1984) (citing *Gates*, 462 U.S. at 236). The role of this court "is simply to ensure that the magistrate had a 'substantial basis for ... conclud[ing]' that probable cause existed." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258 (alteration in original) (quoting *Gates*, 462 U.S. at 238). Reviewing "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Riggs*, 328 N.C. at 222, 400 S.E.2d at 434-35 (alterations in original) (quoting *Gates*, 462 U.S. at 236). Moreover, "[t]he resolution of *doubtful or marginal cases* in this area should be largely determined by the preference to be accorded to warrants." *Id.*, 400 S.E.2d at 435 (emphasis added).

Here, the statements alleged in the affidavit yield more than a fair probability that officers executing a search warrant would find evidence of an illegal drug transaction or illegal drug activity at the Chatham Street address. Detective Rose's affidavit stated that the officers observed the drug transaction in which Taylor purchased heroin from White. Taylor was then stopped by Detective Rose shortly after leaving the scene of the drug transaction. When asked, Taylor confirmed to Detective Rose that she had purchased "a twenty dollar bag of heroin" from White. At this point, officers had witnessed what they believed was a crime involving the sale of illegal drugs, and confirmed that a sale of heroin had occurred through Taylor's statement.

At the same time, Detective Corey followed the blue Jeep Compass to the residence at 146 E. Chatham Street. Based on the chronology set forth in the affidavit, before the traffic stop was initiated against Taylor, Detective Corey radioed Detective Rose and informed him that he observed Tommasone and White go into the apartment at that address.

From this information in the affidavit, the magistrate could reasonably infer that Tommasone and White traveled directly from the scene

of the drug transaction to the Chatham Street residence.[2] In addition, it is reasonable to infer that Tommasone and White went to the residence with the twenty dollars Taylor admitted she used to obtain the heroin. This money was evidence of the drug transaction, and the magistrate could reasonably infer that this evidence would be present at the Chatham Street address. Thus, contrary to our dissenting colleague's assertion, there was a direct connection between the crime observed and the location to be searched.

Even if we were to assume that money obtained from an illegal drug transaction was not evidence of a crime, there still existed sufficient inferences to establish a nexus. *See Allman*, 369 N.C. at 297, 794 S.E.2d at 305 (nexus may be inferred to support a finding of probable cause even absent evidence "directly link[ing] defendant's home with evidence of drug dealing.").

Here, it would also be reasonable to infer that the two drug dealers whom investigators had just observed sell heroin, and who were known by detectives to be involved in drug activity, would have other additional drugs or paraphernalia stored in their residence or vehicle. The practical considerations involved in selling quantities of heroin require that the product be cut, weighed, and packaged at some location. Common sense suggests that the blue Jeep Compass is not the ideal location for such activity, and that a residence is where this type of preparation would take place. Moreover, it is highly unlikely that individuals who are involved in the sale of illegal drugs would trust others in the business to hold their product. Even though not stated in the affidavit, it is also common sense "that drug dealers typically keep evidence of drug dealing at their homes." *Allman*, 369 N.C. at 295-96, 794 S.E.2d at 304. The dissent's assertion that there is no nexus here ignores the totality of the evidence and the inferences which could be reasonably drawn from the facts set forth in the affidavit.

Thus, there was a fair probability that evidence of the illegal drug transaction with Taylor, or other contraband, would be found at the Chatham Street address. There is no question that the affidavit here could have been more specific and provided more facts. But, the dissent would ignore the "great deference" that should be afforded to the magistrate's determination in favor of "after-the-fact scrutiny" in the form of

2. The trial court found in its order denying the motion to suppress that Detective Corey followed the blue Jeep Compass "directly to the residence at 146 E. Chatham Street, Newport."

de novo review. This is not permitted. *See Arrington*, 311 N.C. at 638, 319 S.E.2d at 258 (citing *Gates*, 462 U.S. at 236).

Here, the facts alleged in Detective Rose's affidavit, when taken together with the reasonable inferences that could be drawn therefrom, yield a fair probability that the officers would find contraband or evidence at the drug dealers' residence. Claiming there is no "link" between the drug deal and the Chatman Street Apartment runs counter to a " 'practical, common-sense decision,' based on the totality of circumstances . . . ." *McKinney*, 268 N.C. at 164, 775 S.E.2d at 824 (quoting *Gates*, 462 U.S. at 238).

The magistrate had a substantial basis for determining that probable cause existed. The trial court's order denying Defendant's motion to suppress should be affirmed.

AFFIRMED.

Judge DIETZ concurs.

Judge ZACHARY dissents with separate opinion.

ZACHARY, Judge, dissenting.

In that the search warrant application in the instant case sought to search Defendant's home based solely upon an allegation that his two roommates had recently sold narcotics from a different location, I agree with Defendant that this case is indistinguishable from *State v. Campbell*, 282 N.C. 125, 191 S.E.2d 752 (1972). Because that crime had been completed—and the evidence for its prosecution already obtained—and because the search warrant application did not allege that narcotics had otherwise been possessed or sold in or about the premises, I believe *Campbell* compels this Court to hold that the magistrate did not have a substantial basis for concluding that probable cause existed to search the home. Accordingly, I respectfully dissent, and would reverse the trial court's order denying Defendant's motion to suppress.

On 25 April 2017, officers with the Carteret County Sheriff's Office applied for a warrant to search Defendant's three-bedroom apartment located on E. Chatham Street in Newport ("Defendant's Apartment" or "the Chatham Street Apartment"). Defendant was not named as the target of the search warrant application, although he was the only individual listed on the lease for the Chatham Street Apartment. The

search warrant application instead sought to search the Chatham Street Apartment for "violations of possession of illegal narcotics" by Brittany Tommasone and James White, Defendant's roommates at the time.

As the majority notes, the facts alleged in the search warrant application to support a finding of probable cause to search the Chatham Street Apartment were (1) that Defendant's roommates were seen selling narcotics to an individual at a different apartment complex, and (2) that they thereafter returned to the Chatham Street Apartment.

In his motion to suppress, Defendant argued that these allegations were insufficient to support a finding of probable cause that evidence of narcotics would also be found inside the *Chatham Street Apartment*. Specifically, Defendant noted that the affidavit "included no information indicating that drugs had been possessed in or sold from [the Chatham Street Apartment], and failed to establish a nexus between his residence and the narcotics being sought." I agree that these circumstances warrant reversal of the trial court's denial of Defendant's motion to suppress.

"Probable cause to search exists where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found in a particular place." *United States v. Doyle*, 650 F.3d 460, 471 (4th Cir. 2011) (quotation marks omitted); *accord State v. Allman*, 369 N.C. 292, 294, 794 S.E.2d 301, 303 (2016). Thus, in seeking authorization to search a particular location for contraband, the affidavit must include allegations of some facts or circumstances establishing a nexus between the identified premises and the presence of contraband; an affidavit that "implicates [the] premises *solely as a conclusion of the affiant*" is insufficient. *Campbell*, 282 N.C. at 131, 191 S.E.2d at 757. "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher v. Stanford Daily*, 436 U.S. 547, 556, 56 L. Ed. 2d 525, 535 (1978). Neither our Supreme Court nor the United States Supreme Court has "approved an affidavit for the issuance of a search warrant that failed to implicate the premises to be searched." *Campbell*, 282 N.C. at 131, 191 S.E.2d at 757.

In *State v. Campbell*, officers applied for a warrant to search a home upon obtaining arrest warrants for its residents after they had each sold narcotics to an undercover officer. *Id.* at 130, 191 S.E.2d at 756. The affidavit, however, provided no information from which it could be gleaned that those sales were, in fact, conducted from within the home, nor did the affidavit otherwise indicate "that narcotic drugs were ever possessed

or sold in or about the dwelling." *Id.* at 131, 191 S.E.2d at 757. The affidavit therefore "implicate[d] those premises *solely as a conclusion of the affiant*," having "detail[ed] no underlying facts and circumstances from which the issuing officer could find that probable cause existed *to search the premises described*." *Id.* Quite simply, an inference that narcotics would be found in the premises did "not reasonably arise" from the mere fact that it was the known residence of narcotics dealers. *Id.* Accordingly, our Supreme Court reversed the trial court's denial of the defendant's motion to suppress, in that the search warrant application did not detail "any underlying circumstances . . . from which the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling." *Id.*

I am unable to discern any factor which practically distinguishes the case at bar from *Campbell*,[1] which the majority altogether neglects to discuss.

Just as in *Campbell*, the affidavit in the instant case "details no underlying facts and circumstances from which the issuing officer could find that probable cause existed *to search the premises described*." *Id.* The affidavit here did not contain "any statement that narcotic drugs were ever possessed or sold in or about" the residence. *Id.* Moreover, it is important to note that the officers had already obtained the evidence of the crime for which the search warrant was sought; no facts or circumstances were alleged that suggested the presence of additional narcotics within the Chatham Street Apartment, such as evidence that Defendant's roommates were observed carrying contraband or other related items from their vehicle into the residence following their alleged street-sale. *See id.* at 132, 191 S.E.2d at 757 ("[T]he United States Supreme Court [has] said that there must be 'reasonable grounds at the time of issuance of the warrant for the belief that the law was being violated *on the premises to be searched*.' " (alterations and citation omitted)). Also absent from the affidavit was any insight from the affiant's "training and experience" which might have helped to link the single occurrence of a narcotics transaction with the presence of additional narcotics inside the suspected dealer's home, in light of other suspicious factors. *See Allman*, 369 N.C. at 295-97, 794 S.E.2d at 304-05 (distinguishing the facts from *Campbell* because the search warrant application in *Allman* included both insight from the affiant's training and experience "that

1. It is of no meaningful distinction that the suspects in *Campbell* were *known* to live in the house identified in the search warrant application, whereas the detectives here observed the suspects "go into the apartment at that address." *Majority* at 10. (Emphasis added).

drug dealers typically keep evidence of drug dealing at their homes," *as well as the fact* that the suspect had initially "lied to [the officer] about his true address").

The affidavit instead purported to connect Defendant's Apartment to suspected criminal activity on the basis of Defendant's roommates having returned there after allegedly selling narcotics to an individual from their vehicle at a different apartment complex. *See Campbell*, 282 N.C. at 132, 191 S.E.2d at 757 (explaining the "uniformly held" understanding that observing an individual selling narcotics does "not in any way link such activities to [his] apartment," and is therefore insufficient "to establish probable cause for a search of his apartment"). Having only identified Defendant's Apartment as the current residence of two suspected narcotics dealers, the affidavit thus sought to implicate the residence in the harboring of narcotics "*solely as a conclusion of the affiant*." *Id.* at 131, 191 S.E.2d at 757. As our Supreme Court has explained:

> Probable cause cannot be shown by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. The issuing officer must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion.

Id. at 130-31, 191 S.E.2d at 756 (quotation marks and citations omitted).

Accordingly, I would necessarily hold that the search warrant application in the instant case failed to provide the issuing magistrate with a substantial basis from which to conclude that the proposed search of Defendant's Apartment would reveal the presence of illegal narcotics. I would therefore reverse the trial court's order denying Defendant's motion to suppress the evidence recovered from that search and the judgment entered upon his guilty plea.[2]

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2. Defendant also notes that the written judgment entered in the instant case indicates that he pleaded guilty to a Class F offense, whereas the transcript of plea and Defendant's sentence reveal that the trafficking in cocaine offense to which he pleaded guilty was, in fact, a Class G offense. However, because I would reverse the judgment entered against Defendant upon reversing the order denying his motion to suppress, I do not believe it necessary to further remand the case to the trial court for correction of this clerical error.

STATE v. ELLIS

[267 N.C. App. 65 (2019)]

STATE OF NORTH CAROLINA
v.
SHAWN PATRICK ELLIS, DEFENDANT

No. COA18-817

Filed 20 August 2019

1. Search and Seizure—traffic stop—reasonable suspicion—profane hand gesture made from a vehicle

Where a trooper conducted a traffic stop after seeing defendant make a profane hand gesture from the passenger seat of a moving car, the trial court properly denied defendant's motion to suppress the trooper's testimony because a reasonable suspicion of criminal activity justified the stop. Although a profane gesture directed toward the trooper would have amounted to constitutionally protected speech, it was unclear to the trooper whether defendant was gesturing to him or to another motorist (in which case, defendant's conduct could have amounted to the crime of "disorderly conduct").

2. Sentencing—prior record level—calculation—stipulation—based on error—not binding

In a prosecution for resisting, delaying, and/or obstructing a public officer during a traffic stop, the trial court erred in sentencing defendant as a Level III offender where the parties mistakenly stipulated that one of defendant's prior convictions—which the trial court factored into its prior record level calculation—was a misdemeanor when in fact it was an infraction, which could not be counted as one of the five prior convictions required for a prior record level of III. The parties' stipulation was not binding on the court because it was based on a mistake of law.

Judge ARROWOOD dissenting.

Appeal by Defendant from judgment entered 13 March 2018 by Judge Karen Eady-Williams in Stanly County Superior Court. Heard in the Court of Appeals 27 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General, Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for the Defendant.

DILLON, Judge.

Defendant Shawn Patrick Ellis appeals the trial court's judgment entered upon his guilty plea to resisting, delaying, and/or obstructing a public officer during a stop. Defendant contends that the trial court erred in denying his motion to suppress evidence. After careful review, we affirm.[1]

I. Background

This case arises from Defendant's failure to identify himself to a trooper during a stop. It is a crime in North Carolina for one to refuse to identify himself to a police officer during a *valid* stop. *See State v. Friend*, 237 N.C. App. 490, 768 S.E.2d 146 (2014) (refusing to provide identification during a valid stop may constitute violation of N.C. Gen. Stat. § 14-223 (2017)).

The key issue in this case is whether the trooper conducted a *valid* stop of Defendant. As reiterated by our Supreme Court just last year, "the Fourth Amendment permits a police officer to conduct a brief investigatory stop of an individual based on *reasonable suspicion* that the individual is engaged in criminal activity." *See State v. Nicholson*, 371 N.C. 284, 288-89, 813 S.E.2d 840, 843 (2018) (emphasis added). As explained by our Supreme Court, the "reasonable suspicion" standard required to justify the initiation of a brief, investigatory stop is a low standard, much lower than the "probable cause" standard necessary to initiate an actual arrest, and does not require that the officer witness actual criminal behavior:

> The Fourth Amendment permits brief investigative stops . . . when a law enforcement officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." . . . The standard takes into account the totality of "the circumstances—the whole picture." Although a mere "hunch" does not create reasonable suspicion, the level of suspicion the standard requires is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause.

Id. at 289, 813 S.E.2d at 843 (quoting *Navarette v. California*, 572 U.S. 393, 396-97 (2014)).

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1. This opinion replaces the opinion that was filed 6 August 2019 and withdrawn by order of this Court entered 13 August 2019.

Here, the only evidence offered at the suppression hearing was the testimony of the trooper. Defendant did not testify or offer any evidence to refute the trooper's testimony. The trooper essentially testified that, while standing on the side of the road assisting another driver in icy conditions, he witnessed Defendant wave his entire arm out the window in a distracting manner. At this time, Defendant was riding as a passenger in a vehicle traveling on a public highway in the middle of a group of vehicles all going the same direction. The trooper testified that after Defendant traveled another one hundred (100) yards past his position on the side of the road, Defendant changed his arm gesture to a pumping motion with his middle finger extended. He testified that it was unclear whether Defendant was gesturing to him all this time or was gesturing to someone in one of the other vehicles. The trooper testified that he stopped Defendant to investigate the situation but that Defendant refused to identify himself. Defendant was charged and convicted for his failure to identify himself, not for the gestures.

Defendant moved to suppress the officer's testimony concerning his refusal to identify himself, based on his contention that the facts did not give rise to establish "reasonable suspicion" to justify the stop. Based on the trooper's testimony, however, the trial court orally denied Defendant's motion to suppress. Defendant then pleaded guilty to resisting, delaying, and/or obstructing a public officer during a stop.

II. Motion to Suppress

On appeal, Defendant argues that the trial court erred in denying his motion to suppress.

A. Standard of Review

Typically, we review the denial of a motion to suppress to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015).

In this case, though, the trial court did not make any findings or enter any written order. Rather, following the trooper's testimony and counsels' arguments, the trial court *orally* denied Defendant's motion, stating:

> Based on a review of the evidence, the Court does find reasonable suspicion for the stop. In addition, based on the totality of the evidence the Court does find probable cause for the arrest [for Defendant's failure to identify himself during the stop].

Our Supreme Court has held, however, that the lack of specific findings in an order is not fatal to our ability to conduct an appellate review *if* the underlying facts are not in dispute. *Nicholson*, 371 N.C. at 288, 813 S.E.2d at 843 (stating that "when the facts are not disputed and the trial court did not make specific findings of fact either orally or in writing, we infer the findings from the trial court's decision and conduct a de novo assessment of whether those findings support the ultimate legal conclusion reached by the trial court"). Here, Defendant offered no evidence to refute any of the trooper's testimony. Therefore, we *infer* the factual findings based on the trooper's testimony. *See Nicholson*, ___ N.C. at ___, 813 S.E.2d at 843 ("[W]e consider whether the inferred factual findings arising from the uncontested evidence presented by [the trooper] at the suppression hearing support the trial court's conclusion that reasonable suspicion existed to justify defendant's seizure.").

Further, the lack of *written* conclusions of law is not fatal to meaningful appellate review, as we review a trial court's conclusions of law *de novo* anyway. *See State v. McNeill*, 371 N.C. 198, 220, 813 S.E.2d 797, 813 (2018) ("We review conclusions of law de novo."). That is, the lack of written conclusions does not inhibit our ability to determine whether or not the findings inferred from the trooper's undisputed testimony support a conclusion that the stop was valid.

B. Uncontested Facts

The trial court's inferred findings based on the trooper's testimony tend to show the following:

Around lunchtime on 9 January 2017, the trooper was assisting a motorist in a disabled vehicle on the side of U.S. Highway 52 in Albemarle. There had been a heavy snowstorm in the area a few days prior, snow was still on the ground, and the temperature was still below freezing. The trooper had been assisting other motorists, as there had been a number of reported accidents in the area.

While assisting the motorist, the trooper noticed a group of three or four passing vehicles, including an SUV in the middle of the pack. As the vehicles passed, the trooper saw Defendant stick his arm all the way out of the passenger window of the SUV and make a hand-waving gesture, "a back-and-forth motion [] from [the trooper] towards [Defendant]." At this point, the trooper "believed that [Defendant,] was signaling for [his] attention and was requesting for [him] to respond." The trooper, therefore, turned his entire body away from the motorist he was assisting and toward the passing vehicles to get a better look.

When the SUV was one hundred (100) yards past the trooper's position, the trooper observed Defendant still gesturing with his arm, but that his gesture changed at this point to an up-and-down pumping motion with his middle finger extended:

> [TROOPER:] I know there was a group of three or four cars around that passed, and then as this caught my attention, I did turn my body and completely look. The vehicle was approximately a hundred yards or so past me at this point, at which point my body turned and began to look towards the traffic. The -- hand of the passenger changed from the motioning to a middle finger and was now pumping up and down in the air like this (demonstrating).

The trooper was unsure whether Defendant was gesturing all this time at him or at someone in one of the vehicles around him:

> [COUNSEL:] Okay. So based on this -- this action that you saw, what did you believe was occurring?
>
> [TROOPER:] Actually, two things, sir. I believe, number one, this person signaled to me. For what, I don't know. And number two, they committed a crime of disorderly conduct either towards me or towards someone on the road or with other vehicles -- again, something I was unsure of and had to conduct a traffic stop to find out both of those answers.

The trooper returned to his patrol car and pursued the SUV. During the pursuit, the trooper did not observe the SUV engage in any traffic violations. The trooper, though, did pull the SUV over to investigate the matter.

The trooper approached the SUV and observed Defendant and his wife, who was in the driver's seat, take out their cell phones to record the traffic stop. The trooper knocked on Defendant's window, whereupon Defendant partially rolled it down. The trooper asked Defendant and his wife for their identification. Defendant's wife eventually gave the trooper her license, but Defendant refused to comply.

Defendant's failure to identify himself at that point was a violation of the law. The trooper then requested that Defendant step out of the vehicle. The trooper handcuffed Defendant and placed him in his patrol car. While in the patrol car, Defendant finally gave the trooper his name and told the trooper that he was gesturing toward him. After running warrants checks which yielded no results, the trooper issued Defendant

a citation for resisting, delaying, and obstructing an officer and allowed Defendant and his wife to leave.

C. Analysis

[1] Defendant argues that the trooper's stop was not valid, contending that it is not a crime for one to merely raise his middle finger *at an officer*, as such conduct is simply an exercise of free speech protected by the First Amendment of the United States Constitution.[2] U.S. Const. amend. I ("[The legislature] shall make no law . . . abridging the freedom of speech[.]"). Because Defendant fundamentally mischaracterizes the basis for the stop, we disagree.

We note that there are a number of court decisions from across the country holding that one cannot be held criminally liable for simply raising his middle finger at an officer.[3] This gesture obviously directed at a police officer is simply an exercise of free speech and, therefore, by itself typically would not give rise to reasonable suspicion sufficient to justify a stop. Indeed, the United States Supreme Court has recognized that "fighting words" or gestures obviously directed at an officer are less likely to constitute the crime of disorderly conduct than if those same words or gestures had been directed toward an ordinary citizen since "a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen." *Houston v. Hill*, 482 U.S. 451, 462 (1987) (internal quotations omitted). That Court explained that "the First Amendment recognizes, wisely we think, that a certain amount of expressive disorder [toward police officers] not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." *Id.* at 472.

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2. As applied to the states via the Fourteenth Amendment of the United States Constitution.

3. *See, e.g.*, *Cruise-Gulyas v. Minard*, 918 F.3d 494, 497 (6th Cir. 2019) ("Any reasonable officer would know that a citizen who raises her middle finger engages in speech protected by the First Amendment."); *Freeman v. State*, 302 Ga. 181, 186, 805 S.E.2d 845, 850 (2017) ("[A] raised middle finger, *by itself*, does not, without more, amount to fighting words[.]" (emphasis added)); *Duran v. Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) (holding vehicle passenger's obscene gesture at an officer through an open window, though "inarticulate and crude," was an expression of disapproval that "fell squarely within the protective umbrella of the First Amendment"); *Swartz v. Insogna*, 704 F.3d 105, 110 (2d Cir. 2013) (finding no reasonable suspicion for a stop where "[t]he only act [the officer] had observed prior to the stop that prompted him to initiate the stop was [the defendant's] giving-the-finger gesture."); *Cook v. Board of County Commissioners*, 966 F. Supp. 1049 (D. Kan. 1997) (holding that a private citizen has stated a claim for wrongful prosecution for disorderly conduct where the only evidence against him was that he engaged in a single gesture of displaying his middle finger toward a police officer).

But the circumstances observed by the trooper in this case regarding Defendant's behavior differs from the circumstances in the cases cited in the preceding footnote. Unlike the circumstances in those other cases, where all that was involved was an individual expressing contempt to a law enforcement officer, here, it was not clear to the trooper to whom Defendant was continuously gesturing. Indeed, Defendant was well past the trooper when he changed his gesture to a pumping motion with his middle finger extended. While it may be reasonable for the trooper to suspect that the gesturing was, in fact, meant for him, and therefore maybe constitutionally protected speech, it was also objectively reasonable for the trooper to suspect that the gesturing was directed toward someone in another vehicle and that the situation was escalating. Such continuous and escalating gesturing directed at a driver in another vehicle, if unchecked, could constitute the crime of "disorderly conduct." N.C. Gen. Stat. § 14-288.4(a)(2) (2017) (defining disorderly conduct as committed where a person "makes or uses any . . . gesture . . . intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace").

Perhaps the trooper did not see enough to give him "probable cause" to arrest Defendant for engaging in disorderly conduct. But we conclude that the evidence was sufficient to establish "reasonable suspicion," a much lower standard, to initiate an investigatory stop to determine if Defendant was trying to provoke a motorist. To meet "reasonable suspicion," the trooper was not required to rule out that Defendant was gesturing at him before initiating the stop; indeed, that was the purpose of the stop. *See State v. Williams*, 366 N.C. 110, 117, 726 S.E.2d 161, 167 (2012) (recognizing that "[a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct").[4]

It could be argued that Defendant initiated the stop, not because of concerns for traffic safety, but simply out of anger. But there is no direct evidence that the trooper initiated the stop in bad faith, as Defendant presented no evidence to that effect and the trial court made no such finding. Furthermore, and more significantly, our Supreme Court and the Supreme Court of the United States *compel* us not to consider an officer's *subjective* reason for initiating a stop in determining whether

4. We note our holding in *In re V.C.R.*, involving an individual loudly speaking obscenities toward an officer while standing on a public street. *See In re V.C.R.*, 227 N.C. App. 80, 86, 742 S.E.2d 566, 570 (2013). This Court held that a defendant's yelling of obscenities in public, though it "may be protected speech," does not preclude a determination that the officer had reasonable suspicion to seize the defendant, as such conduct could lead to a breach of the peace in violation of Section 14-288.4(a)(2) of our General Statutes. *Id.*

reasonable suspicion existed. *Nicholson*, 371 N.C. 284, 293, 813 S.E.2d 840, 846 (2018) (stating that the "officer's subjective opinion is not material" in determining whether reasonable suspicion exists); *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that our jurisprudence "foreclose[s] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved"). Therefore, we affirm the trial court's order denying Defendant's motion to suppress based on the presence of "reasonable suspicion" for the initial stop.[5]

IV. Sentencing

[2] Defendant argues that the trial court erred in calculating his Prior Record Level ("PRL") as III. Specifically, he contends that the trial court improperly counted a past conviction based on an error in the State's PRL worksheet.[6] The State concedes this point and agrees that Defendant should have been sentenced at PRL II.

We agree that Defendant, indeed, should have been sentenced at PRL II. The State bears the burden of proving the existence of a defendant's prior convictions, but that burden may be satisfied by stipulation of the parties. N.C. Gen. Stat. § 15A-1340.21(c) (2017). "Once a defendant makes this stipulation, the trial court then makes a legal determination by reviewing the proper classification of an offense so as to calculate the

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5. The State argues, as an alternate legal basis justifying the stop, that the trooper's traffic stop was justified under the judicially-recognized "community caretaking" exception, which allows an officer to initiate a stop even without the presence of reasonable suspicion of criminal conduct, so long as he has a reasonable belief that an individual is in need of aid. *State v. Sawyers*, ___ N.C. App. ___, ___,786 S.E.2d 753, 758 (2016). But it is hard for us to fathom why the trooper would have believed that Defendant and his wife were in need of care. There is no basis to believe that the middle-finger gesture is a sign of distress in Stanly County. And even if there was some basis to make the initial stop based on a concern that Defendant or his wife were in distress, any such concern rapidly dissipated when the officer observed their filming and protesting the stop as he approached the SUV, well before he asked Defendant for his identification.

In any event, we affirm the trial court's order based on the trial court's legal reasoning that the trooper had "reasonable suspicion," notwithstanding that the State did not rely on this legal basis in its appellate argument. Indeed, the State, as appellee, was not required to make any legal argument. *See, e.g.*, *Williams v. Williams*, 339 N.C. 608, 453 S.E.2d 165 (1995) (affirming lower court though appellee did not file a brief); *Bunting v. Bunting*, 2019 N.C. App. LEXIS 607 (2019) (same).

6. Defendant did not object to his sentencing at trial, but his arguments are still preserved. Failure to appeal sentencing does not waive appellate review where a defendant argues that "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law." *State v. Meadows*, ___ N.C. ___, ___, 821 S.E.2d 402, 406 (2018) (quoting N.C. Gen. Stat. § 15A-1446(d)(18) (2017)).

points assigned to that prior offense." *State v. Arrington*, ___ N.C.___, ___, 819 S.E.2d 329, 333 (2018). A PRL is a question of law which we review *de novo*. *State v. Gardner*, 225 N.C. App. 161, 167, 736 S.E.2d 826, 830 (2013).

When determining a PRL in misdemeanor sentencing, level II is achieved when a defendant has between one and four prior convictions, while level III requires at least five prior convictions. N.C. Gen. Stat. § 15A-1340.21(b) (2017). Here, the parties stipulated that a prior conviction for "Expired Operators' License" was a level 2 misdemeanor, making it the fifth prior conviction in Defendant's history. In reality, at the time of Defendant's current offense, possession of an expired operator's license was an infraction. *See* N.C. Gen. Stat. § 20-35(a2) (2017); N.C. Gen. Stat. § 15A-1340.21(b) (2017) ("In determining the prior conviction level, a prior offense may be included if it is either a felony or a misdemeanor[, but not an infraction,] at the time the offense for which the offender is being sentenced is committed."). Without this infraction, Defendant's history only shows four prior eligible convictions.

We note that, in light of our Supreme Court's recent decision in *State v. Arrington*, it would appear that the parties' stipulation to the classification of Defendant's conviction as a misdemeanor is binding on this Court. Our Supreme Court in *Arrington* held that the defendant's stipulation to the existence of a prior conviction in tandem with its classification was "properly understood to be a stipulation to the facts of his prior offense and that those facts supported its [] classification," and was therefore binding on the courts as a factual determination. *Arrington*, ___ N.C. at ___, 819 S.E.2d at 335.

However, *Arrington* is distinguishable from the present circumstance. In *Arrington*, the defendant stipulated to the appropriate classification of his prior conviction where two possible classifications existed depending on the offender's factual conduct in carrying out the offense. *Arrington*, ___ N.C. at ___, 819 S.E.2d at 333. Here, there is no such ambiguity. As a matter of law, no misdemeanor category crime for possession of an expired operators' license existed at the time Defendant was sentenced for his current offense. Therefore, there is no factual basis which would support a misdemeanor classification for this conviction and, as a matter of law, the parties may not stipulate to the same. Our *de novo* review shows that this conviction should not have been included in determining Defendant's PRL.

After removing Defendant's conviction for Expired Operators' License from consideration, we conclude that the trial court properly

considered Defendant's remaining four prior convictions, giving him a PRL of II.[7] N.C. Gen. Stat. § 15A-1340.21(b) ("The prior conviction levels for misdemeanor sentencing are: . . . Level II - - At least 1, but not more than 4 prior convictions[.]").

V. Conclusion

It was not obvious to the trooper that Defendant was simply engaging in free speech toward him when he was gesturing out of his vehicle window. Rather, based on the totality of the circumstances as inferred from the trooper's unchallenged testimony, the trooper had reasonable suspicion that Defendant was engaging in escalating disorderly conduct toward another vehicle to justify the stop. And we hold that the trooper was justified in further detaining Defendant when he failed to provide his identity during the stop. As such, we conclude that the trial court did not err in denying Defendant's motion to suppress.

However, we conclude that Defendant should have been sentenced at PRL II, rather than III. We, therefore, remand to the trial court for the limited purpose of resentencing accordingly.

AFFIRMED IN PART; REMANDED IN PART.

Judge BRYANT concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissents.

Because I do believe there was insufficient evidence to support a traffic stop of the car in which defendant was riding as a passenger, I dissent.

I. Facts

Defendant was arrested on 9 January 2017, after he refused to provide a highway patrol officer his identification when the trooper stopped a car driven, by his wife, in which he was the passenger. The trooper

7. The worksheet stipulated to by the parties shows five additional convictions, apart from the Expired Operators' License infraction. But Defendant was convicted of two of these offenses on the same day, and the trial court rightfully considered only one in calculating his PRL. N.C. Gen. Stat. § 15A-1340.21(d) (2017) ("[I]f an offender is convicted of more than one offense in a single session of district court, or in a single week of superior court or of a court in another jurisdiction, only one of the convictions may be used to determine the prior conviction level.).

initiated the traffic stop after defendant extended his middle finger in the trooper's direction, forming the gesture colloquially known as "shooting him the bird," and started pumping his fist up and down in the air. At the time of the incident, the trooper was helping someone else on the side of the road as the defendant and his wife passed him in their vehicle. The trooper admitted that he did not witness any traffic violation but testified that his reason for the stop was two-fold: (1) he believed they may have been motioning to him for assistance; and (2) he believed they may have been engaging in disorderly conduct by provoking other vehicles on the road to violence.

When the trooper approached the car and attempted to open the passenger door, he saw that both the driver and defendant were videotaping the incident on their phones. The driver and defendant said repeatedly, "You're being recorded. What did we do wrong?" and "This is not a stop-and-ID state." The trooper insisted on taking identification from both of them so he could run warrants checks, and he cited defendant for resisting a public officer when he refused to identify himself.

II. Standard of Review

Defendant filed a motion to suppress, claiming the traffic stop was unlawful and therefore his resistance was lawful. The trial court orally denied the motion without entering any written findings or conclusions.

> In evaluating a trial court's denial of a motion to suppress when the facts are not disputed and the trial court did not make specific findings of fact either orally or in writing, we infer the findings from the trial court's decision and conduct a de novo assessment of whether those findings support the ultimate legal conclusion reached by the trial court.

State v. Nicholson, 371 N.C. 284, 288, 813 S.E.2d 840, 843 (2018) (footnote omitted).

III. Discussion

The State argued in its brief that the trooper's traffic stop was justified under the "community caretaking" exception. The majority properly rejects that argument. This Court has found that hearing "mother f****r" yelled from a moving vehicle was not an objectively reasonable basis for a traffic stop under the "community caretaking" exception. *State v. Brown*, ___ N.C. App. at ___, 827 S.E.2d 534 (2019). As in *Brown*, where the deputy heard the obscenity and unreasonably stopped the passing car, here, the trooper stopped the car after defendant shot him the bird.

I therefore agree with the majority that there is no reasonable basis for the "community caretaking" argument put forth by the State. However, I disagree with the majority's conclusion that a "reasonable suspicion" argument could justify the lower court's ruling.

"The Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution prohibit unreasonable searches and seizures." *State v. Smathers*, 232 N.C. App. 120, 123, 753 S.E.2d 380, 382 (2014) (citing U.S. Const. amend. IV; N.C. Const. art. I, § 20). "Traffic stops are recognized as seizures under both constitutions." *Id.* "[T]raffic stops are analyzed under the 'reasonable suspicion' standard created by the United States Supreme Court[.]" *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968)).

"[A] brief, investigatory [traffic] stop" is permitted if the officer has a "reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000). "While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop." *Id.* "A court sitting to determine the existence of reasonable suspicion must require the [trooper] to articulate the factors leading to that conclusion . . . ." *United States v. Sokolow*, 490 U.S. 1, 10, 104 L. Ed. 2d 1, 12 (1989).

"[I]n determining whether the seizure and search were 'unreasonable' our inquiry is a dual one–whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 19-20, 20 L. Ed. 2d at 905. To determine whether an officer acted reasonably, "due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* at 27, 20 L. Ed. 2d at 909. A court must consider the totality of the circumstances to determine whether a reasonable suspicion exists. *State v. McClendon*, 130 N.C. App. 368, 377, 502 S.E.2d 902, 908 (1998), *aff'd*, 350 N.C. 630, 517 S.E.2d 128 (1999).

Here, the majority concludes that the trooper had a reasonable, articulable suspicion that defendant was committing the crime of disorderly conduct. The inquiry is two-fold: whether the trooper had a minimal objective justification to make the stop and whether the stop was reasonably related in scope to the perceived disorderly conduct.

While the majority cites a number of cases which found that one cannot be held criminally liable for raising one's middle finger at an officer, the majority attempts to differentiate the case *sub judice* by finding it was objectively reasonable for the officer to suspect the gesture was meant for someone in another vehicle. The majority believes that "such continuous and escalating gesturing directed at a driver in another vehicle, if unchecked, could constitute the crime of 'disorderly conduct.' "

The majority presents no evidence to support that defendant's gesture was "continuous and escalating." From the officer's testimony, defendant's gesture simply turned from a hand-waving gesture to flipping the bird. There was no mention that the car was speeding, that the horn was being honked, or any other kind of intensified activities. In fact, the officer testified that he had no issues when pulling the car over. He further testified that when he approached the passenger side of the car where the defendant was sitting the window was rolled up, so at some point defendant had stopped his gesturing out of the window. Simply changing from a waving to an obscene gesture is not enough to support an objective conclusion that a public disturbance was imminent.

Our General Statutes define disorderly conduct in a number of ways, but the one the majority chooses to cite is as "a public disturbance intentionally caused by any person who . . . [m]akes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace." N.C. Gen. Stat. § 14-288.4(a)(2) (2017). There are no facts presented here that support the contention that defendant's gesture was an attempt to intentionally provoke a violent retaliation, nor that it would cause one. There is no testimony or indication that anyone other than the trooper saw it. There was also no indication that the vehicle was creating any danger to other motorists on the road.

I do not believe that this action was sufficient to justify the trooper in becoming alert "to a potential, future breach of the peace," because he did not see any evidence of aggressive driving or other interactions between the vehicles on the road that would suggest road rage. If that was truly his concern he could have followed the vehicle further to see if there was evidence of some road rage toward other vehicles. He did not do so, nor did he testify that he saw any improper driving. He chose not to take any actions to determine if road rage was occurring. Instead, he initiated an improper search and seizure to engage in an improper fishing expedition to find a crime with which to charge the defendant who had directed an obscene gesture to him moments earlier.

Even viewing the evidence in a light most favorable to the State, what we have here is a passenger in a vehicle making an uncalled-for obscene gesture. While defendant's actions were distasteful, they were, in my opinion, within the realm of protected speech under the First Amendment of the United States Constitution. Given that this was protected speech, I believe that the stop was not supported under the reasonable suspicion test of the Fourth Amendment.

In conclusion, extending one's middle finger to a police officer from a moving vehicle, while tasteless and obscene is, in my opinion, protected speech under the First Amendment and therefore cannot give rise to a reasonable suspicion of disorderly conduct. "[T]he First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." *Houston v. Hill*, 482 U.S. 451, 472, 96 L. Ed. 2d 398, 418 (1987).

Therefore, I dissent and vote to reverse the trial court's order denying the motion to suppress and would vacate the conviction.

STATE OF NORTH CAROLINA
v.
WILLIAM ALLAN MILES

No. COA18-1274

Filed 20 August 2019

1. Appeal and Error—preservation of issues—insufficient evidence—not raised in trial court

Defendant failed to preserve for appellate review an argument that the State lacked evidence of "identifying information" in a prosecution for identity theft because he did not raise the issue in the trial court.

2. Conspiracy—to commit robbery with a dangerous weapon—agreement—attempted taking—threat—sufficiency of evidence

The State presented sufficient evidence that defendant and at least four other people had a mutual agreement and intent to rob the victim at gunpoint outside of his house. After two carloads of participants met at a nearby parking lot, one car driven by a female drove into the victim's driveway and honked the car horn to

get the victim to come outside, at which point defendant approached the victim from behind as the victim was retrieving his phone from his car, raised a loaded gun, and threatened the victim not to move.

3. Evidence—witness opinion testimony—law enforcement officer—modus operandi of the crime—conspiracy to commit robbery with a dangerous weapon

In a prosecution for conspiracy to commit robbery with a dangerous weapon, no plain error occurred from the admission of a law enforcement officer's testimony regarding the modus operandi behind the series of events at issue—which included a female driver pulling into the victim's driveway, honking to lure the victim outside, and then defendant approaching the victim from behind and threatening him at gunpoint—and their similarity to other incidents in the same geographic area, since the officer never stated it was his opinion that the suspects were guilty of conspiracy, and the State presented substantial evidence of each element of the crime.

4. Identity Theft—jury instructions—"identifying information"—section 14-113.20—nonexclusive list

In an identity theft case, the trial court properly instructed the jury regarding "identifying information" where it accurately based its instruction on N.C.G.S. § 14-113.20 (defining identity theft) and used nearly verbatim language from the N.C. Pattern Jury Instructions. The Court of Appeals rejected defendant's argument that the statutory list of identifying information was exclusive—therefore, although the statute did not include another person's name, date of birth, and address, where defendant used those pieces of information to present himself as someone else in order to avoid legal consequences, his actions were covered under the statute.

Appeal by defendant from judgment entered 18 September 2017 by Judge James K. Roberson in Durham County Superior Court. Heard in the Court of Appeals 22 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Lewis W. Lamar, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for defendant-appellant.

BRYANT, Judge.

Where the evidence, when taken in the light most favorable to the State, was substantial to show defendant committed the charged offenses, the trial court did not err in denying defendant's motion to dismiss for identity theft and conspiracy to commit robbery with a dangerous weapon. Where the testimony of a law enforcement officer was proper, the trial court did not err in admitting the testimony. Where the trial court properly informed the jury on the identity theft charge, the trial court did not err in giving the jury instruction.

On 6 September 2016, defendant William Allan Miles was indicted for attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, assault with a deadly weapon with intent to kill, and identity theft. The matter was tried on 11 September 2017 before the Honorable James K. Roberson, Judge presiding.

The State's evidence tended to show that at approximately 4:00 a.m. on 29 July 2016, Jacob Badders was asleep in his home on Cole Mill Road when he noticed lights shining into his window and heard a car horn "honking" in his driveway. Badders went outside and encountered a woman who asked to use his phone saying that she had gotten into a fight with her father. Badders told her to leave, and he went inside to call the police. As he started looking for his cellphone, Badders's girlfriend told him they had left their phones in his car. Badders went outside to retrieve their phones, taking his gun with him. When he reached his car, a male approached him with a gun and said, "Don't f**kin' move." The two men exchanged gunfire, and the assailant ran away. Badders called the police who arrived at the scene minutes later.

Officer Lauren McFaul-Brow and Officer J.E. Harris, of the Durham County Police Department, arrived at Badders's house and interviewed Badders and his neighbor John Lobaldo. Badders informed Officer McFaul-Brow that he used "snake shot" as ammunition, which would leave a distinctive wound on his assailant. Later during her investigation, Officer McFaul-Brow received information that someone had come into Duke Regional Hospital—approximately 10 minutes from Badders's house—with a distinctive wound matching the description of the snake shot described by Badders.

Officer Harris interviewed Lobaldo, who had surveillance cameras around his house, and reviewed the surveillance footage. Lobaldo stated that he noticed two cars enter a church parking lot near the intersection of Cole Mill Road. He saw three men get out of one of the cars and run across Cole Mill Road to the back of Badders's house. One of the cars, driven by a white female, left the church parking lot and drove to

Badders's house. The car parked in Badders's driveway and "honked" the horn three times until Badders came outside. Lobaldo heard the shooting and saw the assailant, along with two other men, get into one of the cars as they fled from Badders's house. The assailant seen leaving Badders's house was wearing a white t-shirt, jeans, tennis shoes, and a white toboggan or bandana on his head. Lobaldo stated he could tell the assailant was hurt by the way he was running.

The assailant—later identified as defendant—arrived at the hospital for treatment of his gunshot wounds. When defendant was asked for his name, he responded with a name, date of birth, and address other than his own. He gave the name "Jerel Antonio Thompson" and, as a result, he was provided a hospital tag with that name and corresponding date of birth. Defendant's clothing—a white t-shirt and jeans—was taken into evidence. Defendant later revealed his correct name and other identifying information and told an investigating officer that he started using the identity of Jerel Thompson because "it kind of matched him."

At trial, defendant moved to dismiss charges of attempted robbery with a dangerous weapon, felony conspiracy (to commit robbery with a dangerous weapon), assault with a deadly weapon with intent to kill, and identity theft. The trial court denied defendant's motions to dismiss.

Defendant was found guilty by jury of conspiracy to commit robbery with a dangerous weapon and identity theft. After the trial court declared a mistrial on the remaining charges, the State dismissed those charges. Defendant was sentenced to 29 to 47 months of imprisonment for conspiracy to commit robbery with a dangerous weapon and a consecutive sentence of 12 to 24 months for identity theft. Defendant appealed.

On appeal, defendant argues the trial court erred by: I) failing to dismiss the charges of conspiracy to commit robbery with a dangerous weapon and identity theft, II) permitting improper opinion testimony from a lay witness, and III) instructing the jury on identity theft.

I

Defendant argues that the trial court erred by denying his motion to dismiss because the State did not present substantial evidence to support the charges against him—identity theft and conspiracy to commit robbery with a dangerous weapon. Specifically, defendant argues the State neither proved that he agreed to commit robbery or that he used identifying information of another person. We disagree.

The standard of review for this Court to review the trial court's denial of a motion to dismiss is *de novo*. *State v. Woodard*, 210 N.C. App. 725, 730, 709 S.E.2d 430, 434 (2011). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quotation marks omitted).

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (citation and quotation marks omitted). "[T]he trial court should only be concerned that the evidence is sufficient to get the case to the jury," as opposed to examining the weight of the evidence. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

In the instant case, defendant challenges his convictions for identity theft and conspiracy to commit robbery with a dangerous weapon. We address each claim in order.

Identity Theft

[1] Defendant argues the State did not present evidence of "identifying information" because he only provided another person's name, date of birth, and address. Defendant concedes that he did not preserve this issue for appellate review due to his failure to raise the issue before the trial court.[1] *See* N.C.R. App. P. 10(a)(1) (2019) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling. . . [i]t is also necessary for the complaining party to obtain a ruling [from the trial court] upon the party's request, objection, or motion.").

1. At trial, defendant argued that he did not *knowingly* use the name, date of birth, and address of Jerel Thompson because he was given pain medicine at the hospital. However, that argument was not presented on appeal.

Acknowledging his failure to preserve this issue, defendant asks this Court to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to consider the merits of his argument. *See* N.C.R. App. P. 2 (2019) (Rule 2 provides, in pertinent part, that "[t]o prevent manifest injustice to a party, . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it[.]"). However, this Court will invoke Rule 2 only in exceptional circumstances or to prevent manifest injustice, and defendant has not demonstrated such an exceptional circumstance exists to warrant invocation of the rule. Thus, we decline to exercise our discretion to invoke Rule 2 to address defendant's argument regarding the identity theft charge.[2]

Conspiracy to Commit Robbery with a Dangerous Weapon

[2] Defendant contends the State did not present substantial evidence to withstand a motion to dismiss for conspiracy to commit robbery with a dangerous weapon. We disagree.

> The State's successful assertion of a charge of criminal conspiracy requires proof of an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. The State need not prove an express agreement. Evidence tending to establish a mutual, implied understanding will suffice to withstand a defendant's motion to dismiss.

State v. Boyd, 209 N.C. App. 418, 427, 705 S.E.2d 774, 781 (2011) (citation and quotation marks omitted).

"The proof of a conspiracy may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Lawrence*, 352 N.C. 1, 25, 530 S.E.2d 807, 822 (2000) (citation and quotation marks omitted). Moreover, "[i]n order for a defendant to be found guilty of the substantive crime of conspiracy, the State must prove there was an agreement to perform every element

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2. As an alternative argument, defendant contends his trial counsel provided ineffective assistance by failing to make a general motion to dismiss and preserve the identity theft claim. While defendant's issue does not rise to the level that would require us to suspend the rules, as a practical matter, we analyze the identity theft statute in our review of his properly preserved argument in Issue III, regarding jury instructions. Thus, as noted *infra*, we see no prejudice from trial counsel's actions and dismiss defendant's IAC argument.

of the underlying offense." *State v. Dubose*, 208 N.C. App. 406, 409, 702 S.E.2d 330, 333 (2010).

Here, the evidence presented showed defendant was one of at least four people who occupied two cars that were present at the scene of the crime. Two cars drove into a parking lot of a church located in the victim's neighborhood in the early morning. One car with three male occupants parked at the church parking lot. The other car had a female occupant who then drove into Badders's driveway and initiated contact with Badders by honking her car horn. Badders instructed the female to leave his property, and soon thereafter, Badders was approached by a man––later identified as defendant––with a loaded weapon. After the two men exchanged gunfire, three men including defendant were seen running away from Badders's house. Badders's assailant was seen getting back into the car at the parking lot. When viewing all the evidence in the light most favorable to the State, a logical inference to be drawn is there was a meeting of minds to form an agreement to commit robbery. *See State v. Brewton*, 173 N.C. App. 323, 329–30, 618 S.E.2d 850, 855–56 (2005) (holding that an agreement may be established by circumstantial evidence).

Additionally, the State presented evidence satisfying the essential elements of the underlying offense: robbery with a dangerous weapon. *See State v. Haselden*, 357 N.C. 1, 17, 577 S.E.2d 594, 605 (2003) (stating that a defendant is guilty of robbery with a dangerous weapon under N.C. Gen. Stat. § 14-87 where the defendant commits: "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, [and] (3) whereby the life of a person is endangered or threatened" (citation omitted)).

The evidence shows that defendant approached Badders from behind while Badders was retrieving his phone from his car in the driveway of his house. Defendant raised a loaded weapon towards Badders, threatening him by saying, "don't f**kin' move." Badders reacted by drawing his weapon, and they exchanged gunfire. Defendant's actions accompanied by his words were substantial evidence that defendant manifested the intent to rob Badders, and his arrival at Badders' house with the weapon was an overt act to carry out his intentions. *See State v. Davis*, 340 N.C. 1, 13, 455 S.E.2d 627, 632 (1995) (holding that the defendant's actions were substantial evidence of attempted armed robbery where he drew his pistol and stated to the victim, "Buddy, don't even try it," even without the demand for money or property).

Accordingly, as the State presented substantial evidence that defendant conspired with several others to commit robbery with a dangerous weapon, we overrule defendant's argument.

II

[3] Next, defendant argues the trial court allowed improper witness testimony from Officer Harris into evidence. Specifically, defendant argues that the testimony of Officer Harris, as to the modus operandi of the crime and similar incidents within the area, was inadmissible opinion testimony. Having not objected to the testimony at trial, defendant now urges that Harris's testimony constituted plain error. We disagree.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4) (2019).

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (citation and quotation marks omitted).

Rule 404(b) of the North Carolina Rules of Evidence governs the admissibility of relevant evidence of other crimes, wrongs, or acts.

> This rule is subject to but one exception requiring exclusion [of the evidence] if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged. Thus, although the evidence of the defendant's other crimes may tend to show his inclination to commit them, the evidence is admissible under Rule 404(b), as long as it is also relevant for some other proper purpose. *Such other purposes include establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.*

State v. Allred, 131 N.C. App. 11, 17–18, 505 S.E.2d 153, 157 (1998) (alterations in original) (emphasis added) (internal citations and quotation marks omitted).

Here, Office Harris testified, without objection, during direct examination, to the following when asked specifically about the motive behind the sequence of events:

> [THE STATE]: Tell me about [the motive of the crime or the MO]. What does an "MO" mean?
>
> [OFFICER HARRIS]: Modus operandi, how a criminal operates.
>
> [THE STATE]: And can you describe for the jury what that is?
>
> [OFFICER HARRIS]: It's the way a person particularly commits a crime. With this particular one, it seemed that the suspects would use a female in a car by herself to lure out the victim and easy access into the home. Once the female would get access to the home, the other two suspects or however many suspects would use that opportunity to get entry to the home, take command of it and to commit an armed robbery.
>
> [THE STATE]: Have you seen this particular MO before in that area?
>
> [OFFICER HARRIS]: We have had a number of similar incidents within the area in the city in those -- in that particular time during the summer.

Officer Harris further testified that he became aware of similar incidents occurring in the area after reviewing the reports filed by other officers before his shift.

Defendant's contention that the aforementioned testimony is somehow improper opinion testimony because Officer Harris gave "his opinion [that] the suspects were guilty of conspiracy" is a mischaracterization of Officer Harris's testimony. Contrary to defendant's assertions in his brief, Officer Harris never testified it was his opinion that the suspects were guilty of conspiracy. Officer Harris testified to his understanding of what occurred on the night in question, after interviewing a witness on the scene and reviewing the surveillance video, and merely testified, without objection, to the *modus operandi* defendant used. Our rules of evidence allow a lay witness to testify about details "helpful to the fact-finder in presenting a clear understanding of [the] investigative process" as long as such details are rational to the lay witness's perception and experience. *State v. O'Hanlan*, 153 N.C. App. 546, 562–63, 570 S.E.2d 751, 761–62 (2002).

Moreover, as defendant has not demonstrated it is probable that the jury would have reached a different result—given that the State presented substantial evidence supporting the charge of criminal conspiracy—we conclude the trial court did not commit plain error by admitting the testimony.

III

[4] Finally, defendant argues the trial court erred by instructing the jury on the identity theft charge—specifically as to the element of "identifying information"—in which he contends the instruction was "contrary to existing laws." After careful consideration, we disagree.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989).

Section 14-113.20 of our General Statutes, provides, in pertinent part, that identity theft exists when: "A person . . . knowingly obtains, possesses, or uses identifying information of another person . . . with the intent to fraudulently represent that the person is the other person . . . *for the purpose of avoiding legal consequences*[.]" N.C. Gen. Stat. § 14-113.20(a) (2017) (emphasis added).

The General Assembly enumerated fourteen examples of "identifying information":

> The term "identifying information" as used in this Article includes the following:
>
> (1) Social security or employer taxpayer identification numbers.
>
> (2) Driver's license, State identification card, or passport numbers.
>
> (3) Checking account numbers.
>
> (4) Savings account numbers.
>
> (5) Credit card numbers.
>
> (6) Debit card numbers.

> (7) Personal Identification (PIN) Code as defined in G.S. 14-113.8(6).
>
> (8) Electronic identification numbers, electronic mail names or addresses, Internet account numbers, or Internet identification names.
>
> (9) Digital signatures.
>
> (10) Any other numbers or information that can be used to access a person's financial resources.
>
> (11) Biometric data.
>
> (12) Fingerprints.
>
> (13) Passwords.
>
> (14) Parent's legal surname prior to marriage.

Id. § 14-113.20(b).

On its face, unlike other statutes criminalizing fraudulent crimes involving identities, the statute in question specifically includes the word "use" in reference to making use of another's information to derive a benefit or escape legal consequences. *Compare id.*, *with* N.C. Gen. Stat. § 14-100.1 (stating that it is unlawful for any person to knowingly *possess*, *manufacture*, *or obtain* a false or fraudulent form of identification (emphasis added)), *and* N.C. Gen. Stat. § 14-113.20A (stating it is unlawful for any person to knowingly *sell*, *transfer*, *or purchase* identifying information of another person (emphasis added)). Additionally, the General Assembly amended section 14-113.20 to its current version to expand the conduct prohibited by statute and impose a greater punishment for violating this statute.[3]

Defendant contends that the General Assembly intended for this list to be "distinctive and exclusive" to the aforementioned examples. However, the statute itself disproves defendant's contention of exclusivity by usage of the term "includes" before listing the fourteen examples. *See id.* § 14-113.20(b) ("The term 'identifying information' as used in this Article *includes* the following [examples] . . . ." (emphasis added)). We consider the purpose behind enacting the identity theft statute was to

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3. Section 14-113.20 was also amended to remove "financial" from the original enactment of the identity theft statute. *See* N.C. Sess. Law 2005-414, § 6 (Sept. 21, 2005); *see also* N.C. Gov. Mess., (Sept. 21, 2005) (referring to Sen. Daniel Clodfelter's remarks as a sponsor of the Bill intended to create "comprehensive" legislation equipped with "tools to fight this crime" as "identity theft is one of the fastest-growing crimes in our state right now").

protect against *using* misrepresentation to achieve a benefit. Where a person presents himself to be another person and then *uses* that identification to obtain a favorable result, such actions were intended to be covered under N.C. Gen. Stat. § 14-113.20 to support identity theft convictions. Thus, we reject the notion that a conviction for identity theft is restricted to just the fourteen examples and the General Assembly intended for the list of these examples to be exclusive.

Moreover, *assuming arguendo*, that we were to view the list as exclusive, defendant's conduct would fall under subsection (10)—"[a]ny other numbers or information that can be used to access a person's financial resources[.]" Another person's name, date of birth, and address are possible forms of identifying information where a defendant, like defendant in the instant case, uses the information for the purposes of escaping arrest or other legal consequences and possibly to receive hospital services for his injuries.[4]

A warrant for defendant's arrest was issued under the name Jerel Thompson. Defendant's actual name and identifying information were not discovered and obtained until well after defendant was in custody. Defendant was indicted under the identity theft statute for using the name, date of birth, and address of Jerel Thompson while an investigation was underway regarding the events, including the shooting, that had taken place at Badders's residence. Therefore, such actions embody what the General Assembly intended for the identity theft statute to protect against.

At trial, the trial court used the North Carolina Pattern Jury Instructions for identity theft and instructed the jury as follows:

> The defendant has been charged with identity theft.
>
> For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> First, that the defendant used personal identifying information of another person. A person's name, date of birth, and address would be personal identifying information.

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4. We also consider the federal identity theft statute as persuasive authority, which allows federal prosecution of a person who "knowingly transfers, possesses, or uses, without lawful authority, a *means of identification* of another person with the intent to commit . . . any unlawful activity[.]" *See* 18 U.S.C. § 1028(a)(7) (2017) ("Fraud and related activity in connection with identification documents, authentication features, and information"). By definition, "means of identification" includes a name and date of birth "alone or in conjunction with any other information, to identify a specific individual." *Id.* § 1028(d)(7)(A).

> And, second, that the defendant acted knowingly and with the intent to fraudulently – fraudulently represent that the defendant was that other person for the purpose of avoiding legal consequences.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant used personal identifying information of another person and that the defendant did so knowingly with the intent to fraudulently represent that the defendant was that other person for the purpose of avoiding legal consequences, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

The Pattern Jury Instruction provides:

> For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> First, that the defendant [obtained] [possessed] [used] personal identifying information of another person. (Name type of identifying information, e.g., social security number) would be personal identifying information.
>
> And Second, that the defendant acted knowingly and with the intent to fraudulently represent that the defendant was that other person for the purpose of [making [financial] [credit] transactions in the other person's name] [obtaining anything of [value] [benefit] [advantage]] [avoiding legal consequences].
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant [obtained] [possessed] [used] personal identifying information of another person and that the defendant did so knowingly, with the intent to fraudulently represent that the defendant was that other person for the purpose of [making [financial] [credit] transactions in that other person's name] [obtaining anything of [value] [benefit] [advantage]] [avoiding legal consequences], it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

N.C.P.I.—Crim. 219B.80 (2018).

Here, the trial court gave accurate jury instructions in accordance with the statute and nearly verbatim to the approved pattern jury instructions for identity theft. "Jury instructions in accord with a previously approved pattern jury instruction provide the jury with an understandable explanation of the law," and this Court has recognized "that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions." *State v. Ballard*, 193 N.C. App. 551, 555, 668 S.E.2d 78, 81 (2008) (citation and quotation marks omitted). Having already considered and determined that a person's name, date of birth, and address constitutes identifying information under the statute, we reject defendant's contention that the trial court gave a jury instruction as to identifying information that was "contrary to existing law." Accordingly, we find no error in the trial court's jury instruction on identity theft.

NO ERROR.

Judges TYSON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
JAMES ALLEN RUTLEDGE

No. COA19-32

Filed 20 August 2019

1. Criminal Law—right to jury trial—waiver—statutory notice—notice of intent and request for arraignment on the day of trial

The trial court did not err by allowing defendant to waive his right to a jury trial where defendant gave notice of his intent to waive a jury trial on the day of the trial, the trial court and the State both consented to the waiver, and defendant invited noncompliance with the timeline requirements of N.C.G.S. § 15A-1201(c) by his own failure to request a separate arraignment prior to the date of the trial.

2. Criminal Law—right to jury trial—waiver—trial court's colloquy with defendant—statutory requirements

The trial court did not err by allowing defendant to waive his right to a jury trial where the trial court complied with N.C.G.S. § 15A-1201(d)(1) by addressing defendant personally—explaining the consequences of waiving a jury trial and asking whether

defendant had discussed his rights and the consequences of waiving them with his attorney. Contrary to defendant's argument on appeal, the trial court was not required to ask defendant whether he was literate, whether he was satisfied with his lawyer's work, or whether anyone had made promises or threats to induce him to waive a jury trial.

3. Criminal Law—right to jury trial—waiver—right to revoke waiver within 10 business days—waiver on day of trial

The Court of Appeals rejected defendant's argument that the trial court was required to provide him with a 10-day "cooling-off" revocation period before starting trial where defendant waived his right to a jury trial on the first day of trial. A plain reading of N.C.G.S. § 15A-1201(e) did not compel such a rule, which would effectively allow criminal defendants to force a mandatory 10-day continuance.

4. Criminal Law—right to jury trial—waiver—prejudice

Even assuming the trial court erred by allowing defendant to waive his right to a jury trial, defendant could not show prejudice where he chose to wait until the day of trial to give his intent to waive his right and there was no indication that a jury would have been privy to exculpatory evidence that the trial court did not consider.

Appeal by defendant from judgment entered 14 August 2018 by Judge R. Gregory Horne in Transylvania County Superior Court. Heard in the Court of Appeals 8 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General John Tillery, for the State.

Jeffrey William Gillette for defendant-appellant.

TYSON, Judge.

James Allen Rutledge ("Defendant") appeals from judgment entered after the trial court found him guilty of one count of possession of methamphetamine, a Schedule II controlled substance. We affirm.

I. Background

In late 2017, the Brevard Police Department received complaints about suspected drug trafficking occurring at a Transylvania County home. On 29 November 2017, officers executed a search warrant for the home at 54 Camp Harley Farm Drive in Transylvania County. Officers

observed Defendant and another male standing outside the home. As part of the process of executing the search warrant, the officers secured the men. The officers conducted a pat-down search of Defendant and found a small purple case containing a crystal-like substance. Testing revealed the substance to be one-tenth of a gram of methamphetamine. Defendant was indicted on 12 February 2018 for one count of possession of methamphetamine, a Schedule II controlled substance.

Defendant's case was called for trial on 14 August 2018. At the start of trial, Defendant requested to waive his right to a trial by jury and have the judge hear the evidence and adjudicate the charge. Defendant's attorney stated: "Good Afternoon. May it please the Court, at this point in time we do have and do request a waiver of jury trial in this matter." Defendant's attorney also confirmed engaging in prior discussions with the prosecutor about the waiver, and asserted the State had no objections.

The following colloquy then occurred:

> THE COURT: All right. . . . Mr. Rutledge, if you would just stand up where you are, sir. Mr. Rutledge, good afternoon, sir. Sir, you are charged with possession of methamphetamine. Mr. Barton represents you in this matter. Is that correct?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Possession of methamphetamine is a felony. It's a Class I felony. The maximum possible punishment for any Class I felony under North Carolina law is up to 24 months. That would be the maximum. If your prior record level if it is not a VI, the maximum you would face would be correspondingly lower. Have you had an opportunity to talk with Mr. Barton and review the maximum that you actually would face given your prior record, sir?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: All right. And I will ask you a couple of questions about that. I'm advised that, by Mr. Barton, that it is your desire to waive a jury trial in this matter and have a bench trial; is that correct?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: And you do understand, sir, that you have the right to have 12 jurors, jurors of your peers, selected,

that you have the right to participate in their selection pursuant to the rules set forth in our law and that any verdict by the jury would have to be a unanimous verdict, unanimous of the 12? Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: You have the right to waive that and instead have a bench trial, which would mean that the judge alone would decide guilt or innocence and the judge alone would determine any aggravating factors that may be present were you to waive your right to a jury trial. Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: Have you talked with Mr. Barton about your rights in this regard and the ramifications of waiving a jury trial?

DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about the jury trial or your rights therein?

DEFENDANT: No, sir.

THE COURT: All right. And, sir, is it your decision then that you wish, and your request, that the jury trial be waived and that you be afforded a bench trial?

DEFENDANT: Yes, sir.

THE COURT: All right. Thank you, sir.

The court granted Defendant's motion to waive his right to a jury trial. The court and Defendant signed form AOC-CR-405 ("Waiver of Jury Trial form"). The document was not signed by the State. After the waiver was entered, Defendant's attorney requested that Defendant be arraigned. After arraignment, Defendant's trial began.

The State offered testimony from the two police officers who found the drugs on Defendant's person on 29 November 2017. Defendant stipulated that the substance found in the purple case was methamphetamine without further testimony from employees of the State Crime Lab. Defendant testified and asserted he had never before seen the small purple case. Following trial, the court entered a verdict of guilty, and imposed a split sentence of four months' imprisonment followed

by thirty months' supervised probation. Defendant timely filed written notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2017).

III. Issue

The sole issue on appeal is whether the trial court erred in granting Defendant's request to waive a jury trial and to proceed to a bench trial in violation of N.C. Gen. Stat. § 15A-1201 (2017).

IV. Standard of Review

The Court conducts a *de novo* review of a question of law to determine whether a trial court has violated a statutory mandate. S*tate v. Mumma*, ___ N.C. App. ___, ___, 811 S.E.2d 215, 220 (2018).

V. Analysis

The North Carolina Constitution affirmatively confirms a defendant's right to request a bench trial, subject to the trial court's approval. N.C. Const. art. I, § 24. In 2014, the North Carolina General Assembly amended N.C. Gen. Stat. § 15A-1201 to allow criminal defendants in non-capital cases to waive their right to a trial by jury. In 2015, the statute was again amended to include provisions regarding advance notice, revocation period, and judicial consent. *Id.*

A. Statutory Violation

Defendant argues the trial court committed reversible error in violation of N.C. Gen. Stat. § 15A-1201 in three ways: (1) by failing to require the statutory notice provision set out in N.C. Gen. Stat. § 15A-1201(c); (2) by failing to comply with N.C. Gen Stat. § 15A-1201(d)(1), which requires the trial court to "determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury"; and, (3) by failing to provide Defendant the statutory 10-day revocation period before starting the trial as required by N.C. Gen. Stat. § 15A-1201(e).

1. Advance Notice

[1] Defendant argues the trial court erred when it failed to require Defendant's compliance with the notice provision outlined by N.C. Gen. Stat. § 15A-1201(c). The statute allows a defendant charged with a

non-capital offense to give notice of his intent to waive his right to a trial by jury in any of the three following ways:

> (1) Stipulation, which may be conditioned on each party's consent to the trial judge, [and] signed by both the State and the defendant . . .
>
> (2) Filing a written notice of intent to waive a jury trial with the court . . . within the earliest of (i) 10 working days after arraignment, (ii) 10 working days after service of a calendar setting under G.S. 7A-49.4(b), or (iii) 10 working days after the setting of a definite trial date under G.S. 7A-49.4(c).
>
> (3) Giving notice of intent to waive a jury trial on the record in open court by the earlier of (i) the time of arraignment or (ii) the calling of the calendar under G.S. 7A-49.4(b) or G.S. 7A-49.4(c).

N.C. Gen. Stat. § 15A-1201(c).

The critical times under the statute for filing a waiver of a jury trial are the date of arraignment, the date of service of a calendar setting, and the date of calendar call. Nothing in the record before us indicates when either the calendar setting under N.C. Gen. Stat. § 7A-49.4(b) (2017) or the setting of the definite trial date under N.C. Gen. Stat. § 7A-49.4(c) (2017) occurred in this case.

Defendant was not formally arraigned until the day of trial. Apparently, a formal arraignment was not requested by Defendant at any time prior to the scheduled trial date. Formal arraignment may be waived. Pursuant to N.C. Gen. Stat. § 15A-941(d) (2017), "[a] defendant will be arraigned in accordance with this section only if the defendant files a written request with the clerk of superior court for an arraignment not later than 21 days after service of the bill of indictment."

This Court addressed similar issues to those at bar in both *State v. Swink*, 252 N.C. App. 218, 797 S.E.2d 330 (2017) and *State v. Jones*, 248 N.C. App. 418, 789 S.E.2d 651 (2016). In *Jones*, the defendant never requested a formal arraignment pursuant to N.C. Gen. Stat. § 15A-941. *Id.* at 423, 789 S.E.2d at 655. This Court held the defendant never requested a formal arraignment, and his right to be formally arraigned was deemed waived twenty-one days after he was indicted. *Id.*

In *Swink*, the defendant never entered a "not guilty" plea to trigger informal arraignment. Defendant's request for a bench trial functioned

as an implicit plea of not guilty. *Swink*, 252 N.C. App. at 222, 797 S.E.2d at 333. This Court held in *Swink* no violation of the statutory notice provision of N.C. Gen. Stat § 15A-1201(c) occurred when no stipulation was provided and the defendant was arraigned on the day of his trial. *Id*. The defendant's actions barred the court from enforcing technical compliance with the provision. This Court found no error in *Swink*. *Id*. We find none here.

The filing of a written notice of intent to waive a jury trial on the date of the arraignment and subsequent trial is proper where: (1) the defendant gives notice of his intent to waive his right to a jury trial at the date of trial; (2) consent is given to waive jury trial by both the trial court and the State; and (3) the defendant invites noncompliance with the timeline requirements of N.C. Gen. Stat § 15A-1201(c) by his own failure to request a separate arraignment prior to the date of trial. *See* N.C. Gen. Stat § 15A-1201. It is not necessary to postpone the subsequent trial by ten working days, due to a defendant's decision to not request prior arraignment until the trial date itself. *See Swink*, 252 N.C. App. at 222, 797 S.E.2d at 333.

2. Judicial Consent

[2] Defendant argues the trial court ignored procedural safeguards when it failed to "solicit much of the information normally required in order to determine if a waiver is [made] knowing[ly] and voluntar[ily]." The trial court did not specifically ask Defendant whether he was literate, whether he was satisfied with his lawyer's work, or whether anyone had made promises or threats to induce him to waive a jury trial. Neither N.C. Gen. Stat. § 15A-1201(d)(1) nor applicable case law has established a script for the colloquy that should occur between a superior court judge and a defendant seeking to exercise his right to waive a jury trial.

In *Swink*, where the defendant sought to waive his right to trial by jury, the trial court never specifically asked the defendant whether or not he was satisfied with his lawyer's work or whether anyone had made promises or threats to induce him to waive a jury trial. *Swink*, 252 N.C. App. at 219-20, 797 S.E.2d at 331-32.

N.C. Gen. Stat. § 15A-1201(d)(1) requires the trial court to: "[a]ddress the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury." N.C. Gen. Stat. § 15A-1201(d)(1). No other specific inquiries are required in the statute to make the determination of Defendant's understanding and

appreciation of the consequences "to waive his trial by jury." *Id.* This Court will not read such further specifications into law.

Here, Defendant appeared in court with his attorney on the day of trial, who initiated and informed the trial judge of Defendant's specific desire to waive a jury trial and proceed with a bench trial. The trial court clearly explained to Defendant that waiving his right to a trial by jury meant "the judge alone would decide guilt or innocence and the judge alone would determine any aggravating factors that may be present." The judge also inquired whether Defendant had the opportunity to discuss his rights and the ramifications of the waiver with his attorney. As noted above, in response to each question, Defendant answered "yes."

The trial court also confirmed that Defendant knew the offense was non-capital and knew the maximum sentence that could be imposed. Defendant responded he had no other questions about the waiver, trial, or his rights. Defendant swore that by signing the form, he was freely, voluntarily, and knowingly waiving his right to a jury trial.

The trial court's colloquy mirrored the acknowledgements made on the Waiver of Jury Trial form. The colloquy between the trial court and Defendant established that Defendant "fully underst[ood] and appreciate[d] the consequences of the defendant's decision to waive the right to trial by jury." *Id.*

3. Revocation Period

[3] N.C. Gen. Stat § 15A-1201(e) provides that: "[o]nce waiver of a jury trial has been made and consented to by the trial judge pursuant to subsection (d) of this section, the defendant may revoke the waiver one time as of right within 10 business days of the defendant's initial notice[.]" Defendant argues N.C. Gen. Stat. § 15A-1201(e) mandates a ten-day "cooling-off" period, wherein defendants are permitted ten working days to reflect upon their choice to waive. This revocation period is granted following the required notice outlined in N.C. Gen. Stat § 15A-1201(c).

A plain reading of the statute does not compel a mandatory ten-day cooling-off period for a waiver made on the eve of trial. Rather, the statute provides a period when the waiver was provided in advance of trial during which a defendant has an absolute right to revoke a waiver. If a defendant moves to revoke such a waiver after the ten-day period has lapsed, N.C. Gen. Stat. § 15A-1201(e) provides that "the defendant may only revoke the waiver of a trial by jury upon the trial judge finding the revocation would not cause unreasonable hardship or delay to the State." To interpret and enforce this power to revoke within ten days

as a "mandatory cooling-off period" is inconsistent with the text of the statute and the prior actions of Defendant.

Allowing a ten-day revocation period when defendant has declared intent to waive a jury trial at an informal arraignment, contemporaneous with the start of trial, would allow a defendant to *force* a mandatory ten-day continuance. The General Assembly, in drafting N.C. Gen. Stat. § 15A-1201(e), anticipated a defendant may improperly attempt to waive his right to a trial by jury on the scheduled day of trial. Nothing shows the General Assembly intended for the revocation period provision to create or to allow such a loophole and cause unnecessarily delays.

Were defendants unilaterally permitted to force such a continuance, the provisions of N.C. Gen. Stat. § 15A-1201 would lead to absurd results. Under the absurdity doctrine, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (quoting *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979)).

In 2015, a proposed amendment to N.C. Gen. Stat § 15A-1201(e) was introduced in the North Carolina Senate to expressly allow a defendant to "revoke [his waiver of jury trial] until such time as the first witness is sworn." That proposed amendment failed. *See* An Act to Establish Procedure for Waiver of The Right to a Jury Trial in Criminal Cases in Superior Court: Hearing on H.B. 215 Before the Subcomm. on the Judiciary B of the H. Comm. On the Judiciary, 2015 Leg.

The intent of our General Assembly was to prevent a defendant from forcing undue delays by invoking the revocation period provision as late as the day of his trial. If Defendant wanted to take advantage of the ten-day revocation rule, he should have given advance notice and requested arraignment prior to trial. *See* N.C. Gen. Stat § 15A-1201(e).

B. Prejudice

[4] Even were we to presume Defendant could show the trial court erred by granting his requested waiver of a jury trial, Defendant must also show the actions of the trial court prejudiced him to receive a new trial. *See Swink*, 252 N.C. App. at 221, 797 S.E.2d at 332; *see also State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) ("when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding [the] defendant's failure to object at trial."). In *State v. Love*,

this Court stated: "However, a new trial does not necessarily follow a violation of statutory mandate. Defendants must show not only that a statutory violation occurred, but also that they were prejudiced by this violation." 177 N.C. App. 614, 623, 630 S.E.2d 234, 240-41 (2006) (citations omitted).

N.C. Gen. Stat. § 15A-1443 places the burden on Defendant to show a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial." N.C. Gen. Stat. § 15A-1443(a) (2017). "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2017). *See also State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) ("a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review").

If Defendant wanted to waive his jury trial in accordance with N.C. Gen. Stat. § 15A-1201, he needed to request a formal arraignment prior to trial and deliver notice of intent to waive at either that arraignment time, or the time of the calling of the calendar. Defendant failed to do either.

Defendant waited until the day of trial to announce his intention to waive his right to trial by jury. Presuming, without finding, the trial court's grant of Defendant's requested waiver was error under N.C. Gen. Stat. § 1201, Defendant has failed to and cannot show prejudice under N.C. Gen. Stat. § 15A-1443.

The record is devoid of any indication tending to show a jury would have been privy to exculpatory evidence that this trial court did not consider. Defendant initiated and requested the waiver of a jury trial on the day of trial. Defendant made the strategic choice to request a bench trial and was informed of the potential consequences of his request and proceeded to trial. The trial court's grant of such request, even if it was shown to be in technical violation of N.C. Gen. Stat. § 15A-1201, was not prejudicial. Defendant's arguments are overruled.

VI. Conclusion

Defendant clearly initiated his choice for a bench trial and proceeded to trial and testified after being fully advised and counseled on the potential consequences. He has not shown that his own strategic choice to waive his right to a jury trial on the day of trial prejudiced him in any way.

We hold the trial court did not commit any error to warrant a new trial by allowing Defendant to waive his right to a jury trial and proceed

to trial on the scheduled trial date. Defendant's conviction and the judgment entered thereon are affirmed. *It is so ordered.*

AFFIRMED.

Judges INMAN and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
JERRY GIOVANI THOMPSON

No. COA17-477-2

Filed 20 August 2019

Search and Seizure—suspicionless seizure—incident to execution of a search warrant—"occupant" of searched premises

In a prosecution for various drug possession charges, where a team of officers detained defendant while executing a warrant to search his girlfriend's apartment, the trial court erred by denying defendant's motion to suppress evidence recovered from his nearby vehicle because—assuming a Fourth Amendment seizure did occur when the officers retained defendant's driver's license—a suspicionless seizure incident to the warrant's execution was unjustified because defendant was not an "occupant" of the searched premises. Although defendant and his vehicle were physically close to the apartment, defendant cooperated with police questioning, never attempted to approach the apartment, and otherwise did nothing to interfere with the officers' search.

Judge BERGER dissenting.

Appeal by defendant from judgment entered 3 January 2017 by Judge William R. Bell in Mecklenburg County Superior Court. Originally heard in the Court of Appeals 5 October 2017, with opinion issued 2 January 2018. On 1 February 2019, the Supreme Court vacated and remanded to this Court for reconsideration in light of *State v. Wilson*, 371 N.C. 920, 821 S.E.2d 811 (2018).

Attorney General Joshua H. Stein, by Assistant Attorney General Robert T. Broughton, for the State.

Robinson, Bradshaw & Hinson, P.A., by Erik R. Zimmerman, for defendant-appellant.

ZACHARY, Judge.

Defendant Jerry Giovani Thompson appealed from the trial court's judgment sentencing him for convictions of felony possession of marijuana, possession with intent to sell or deliver marijuana, possession of marijuana paraphernalia, and possession of a firearm by a felon. Defendant argued on appeal that the trial court erred in denying his motion to suppress.[1] By published opinion issued on 2 January 2018, a majority of this Court concluded over a dissent "that the factual findings in the order denying defendant's suppression motion did not resolve a pivotal disputed issue of fact, requiring us to vacate the judgment and remand for further findings." *State v. Thompson*, ___ N.C. App. ___, ___, 809 S.E.2d 340, 343 (2018) ("*Thompson I*"). The Supreme Court subsequently vacated *Thompson I* and remanded the matter to this Court for reconsideration in light of the Supreme Court's decision in *State v. Wilson*, 371 N.C. 920, 821 S.E.2d 811 (2018). Upon reconsideration, we conclude that the trial court's order denying Defendant's motion to suppress cannot be upheld on the grounds enumerated in *State v. Wilson*. Accordingly, we vacate the judgment and remand for entry of additional findings consistent with our decision in *Thompson I*.

I. Background

On 10 April 2015, a team of roughly eight to twelve law enforcement officers with the Charlotte-Mecklenburg Police Department traveled to an apartment on Basin Street in Charlotte in order to execute a search warrant. The target of the search warrant was a female.

Defendant was cleaning his vehicle in the street adjacent to the apartment when the officers arrived to execute the search warrant. Sergeant Michael Sullivan approached Defendant in order to confirm that he was not the female named in the search warrant and to ensure that he would not interfere with the search. Defendant told Sergeant Sullivan that he did not live in the apartment, but his girlfriend did.

Sergeant Sullivan asked Defendant for his identification, "handed him" and his driver's license off to Officer Justin Price, and then proceeded inside the apartment in order to supervise the search. Officer

1. Defendant also argued that the judgment sentencing him for felony possession of marijuana should be vacated on the grounds that he did not plead guilty to that offense.

Price testified that Defendant was already in custody at that point. Officer Price and Officer Michael Blackwell remained outside with Defendant while the other officers executed the search warrant. Roughly ten minutes later, Officer Mark Hefner exited the apartment and asked Defendant for permission to search his vehicle. Defendant consented to the search, and officers found marijuana, paraphernalia, and a firearm in the trunk.

Defendant was indicted for possession of marijuana paraphernalia, possession with intent to sell or deliver marijuana, felony possession of marijuana, maintaining a vehicle for the purpose of keeping a controlled substance, and possession of a firearm by a felon.

On 4 October 2016, Defendant filed a motion to suppress the evidence seized from the search of his vehicle. Defendant argued that "[t]he initial police encounter . . . was not a voluntary contact, but rather an illegal seizure and detention of [Defendant] which was unsupported by reasonable suspicion," and that the trial court was therefore required to "suppress all evidence gathered as a result of the illegal seizure of his person and the illegal search of his vehicle." Following a hearing, however, the trial court found that Defendant "was neither seized nor in custody" at the time he consented to the search of his vehicle.

Because Defendant was never "seized" within the meaning of the Fourth Amendment, the trial court concluded that no Fourth Amendment violation had occurred and, accordingly, denied Defendant's motion to suppress. Defendant subsequently pleaded guilty to possession of drug paraphernalia, possession with intent to sell or deliver marijuana, and possession of a firearm by a felon, preserving his right to appeal the trial court's denial of his motion to suppress. The trial court imposed a suspended sentence and placed Defendant on 24 months' supervised probation. A written order denying Defendant's motion to suppress was entered on 5 January 2017. Defendant timely appealed.

This Court heard Defendant's appeal on 5 October 2017. Defendant argued on appeal that the officers "seized" him for purposes of the Fourth Amendment "when they took and retained his driver's license," and that such seizure, in the absence of "any reasonable suspicion that he was involved in criminal activity," violated Defendant's Fourth Amendment rights. Citing *State v. Cottrell*, 234 N.C. App. 736, 760 S.E.2d 274 (2014), Defendant maintained that the trial court was required to suppress the evidence recovered from the search of his vehicle because it was the product of "this unconstitutional seizure."

Over a dissent, this Court concluded that the trial court's findings of fact were insufficient to determine whether Defendant had been "seized" for purposes of the Fourth Amendment:

> It is long-established that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980). As a result, "an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *INS v. Delgado*, 466 U.S. 210, 215, 80 L. Ed. 2d 247, 255 (1984).
>
> . . . .
>
> In determining whether a defendant was seized, "relevant circumstances include, but are not limited to, the number of officers present, whether the officer displayed a weapon, the officer's words and tone of voice, any physical contact between the officer and the individual, whether the officer retained the individual's identification, or property, the location of the encounter, and whether the officer blocked the individual's path." *State v. Icard*, 363 N.C. 303, 309, 677 S.E.2d 822, 827 (2009).
>
> . . . .
>
> In arguing that he was seized, defendant places great emphasis upon his contention that the law enforcement officers retained his driver's license during the encounter. Defendant cites several cases, including *State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009), in which this Court stated, in analyzing whether the defendant had been seized, that "a reasonable person under the circumstances would certainly not believe he was free to leave without his driver's license and registration." We find this argument persuasive. Indeed, we have not found any cases holding that a defendant whose identification or driver's license was held by the police without reasonable suspicion of criminal activity was nonetheless "free to leave."
>
> . . . .

> In its appellate brief, the State does not dispute the crucial significance of whether the officers kept defendant's license. . . . The State instead argues that the trial court's findings of fact fail to establish whether the officers retained defendant's license or returned it to him after examination. We agree with this contention.
>
> Witnesses at the hearing on defendant's suppression motion gave conflicting testimony with regard to the circumstances under which law enforcement officers took possession of defendant's driver's license and the time frame in which the relevant events occurred. . . .
>
> [D]efendant testified that the officers retained his license, but the officers did not testify about this issue. Assuming that the law enforcement officers kept defendant's identification, the testimony is conflicting as to whether defendant's car was searched before, immediately after, ten minutes after, or a half-hour after defendant gave his license to [Sergeant] Sullivan.
>
> . . . .
>
> In this case, the trial court's findings of fact do not resolve the question of whether the law enforcement officers returned defendant's license after examining it, or instead retained it, or the issue of the sequence of events and the time frame in which they occurred. Given that the officers conceded that their interaction with defendant was not based upon suspicion of criminal activity, a finding that officers kept defendant's identification would likely support the legal conclusion that he had been seized.

Thompson I, ___ N.C. App. at ___, 809 S.E.2d at 345-49 (internal citations, quotation marks, and brackets omitted). Accordingly, "[b]ecause the court's findings of fact fail[ed] to resolve material issues, we vacate[d] the judgment entered against defendant, and remand[ed] for the trial court to enter findings of fact that resolve all material factual disputes."[2]

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2. We likewise agreed with Defendant "that the judgment entered against [him] and the written transcript of plea, both of which were signed by the trial judge, are inconsistent," and therefore remanded "for resolution of this discrepancy." *Id.* at ___, 809 S.E.2d at 343. The dissent, and thus the resulting appeal, was not predicated upon this ground, nor does the Supreme Court's decision in *Wilson* affect that conclusion. Accordingly, we reiterate that portion of our holding from *Thompson I*, but decline to address it further in this opinion.

Id. at ___, 809 S.E.2d at 349. Judge Berger dissented on the grounds that "Defendant was never seized by Charlotte-Mecklenburg Police Department . . . officers within the meaning of the Fourth Amendment." *Id.* at ___, 809 S.E.2d at 350 (Berger, J., dissenting).

The State appealed of right to our Supreme Court pursuant to N.C. Gen. Stat. § 7A-30(2). On 1 February 2019, the Supreme Court vacated *Thompson I* and remanded the case to this Court for review in light of its decision in *State v. Wilson*, 371 N.C. 920, 821 S.E.2d 811 (2018).

Wilson requires this Court to determine, assuming, *arguendo*, that Defendant was in fact "seized" for purposes of the Fourth Amendment, whether such seizure was nevertheless justified under the rule set forth by the United States Supreme Court in *Michigan v. Summers*, 452 U.S. 692, 69 L. Ed. 2d 340 (1981). We conclude that it was not.

II. *Michigan v. Summers* and *State v. Wilson*

In *Michigan v. Summers*, the United States Supreme Court held that "for Fourth Amendment purposes, . . . a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." 452 U.S. at 705, 69 L. Ed. 2d at 351 (footnote omitted). Our Supreme Court in *Wilson* identified three prongs to the rule: "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain (1) the occupants, (2) who are within the immediate vicinity of the premises to be searched, and (3) who are present during the execution of a search warrant." *Wilson*, 371 N.C. at 924, 821 S.E.2d at 815 (citations and quotation marks omitted). "These three parts roughly correspond to the 'who,' 'where,' and 'when' of a lawful suspicionless seizure incident to the execution of a search warrant." *Id.*

Our Supreme Court in *Wilson* applied the *Summers* rule and rejected the defendant's challenge to the trial court's denial of his motion to suppress. In that case, the defendant had arrived on the scene while the Winston-Salem Police Department was in the process of actively securing a home in order to execute a search warrant. *Id.* at 922, 821 S.E.2d at 813. The defendant penetrated the perimeter securing the scene, walked past an officer, and announced that he was going to retrieve his moped. *Id.* After disobeying the officer's command to stop, the defendant proceeded down the driveway toward the home, at which point officers detained and frisked him. *Id.* Officers recovered a firearm, and the defendant was charged with possession of a firearm by a felon. *Id.* at 922, 821 S.E.2d at 814.

In determining whether the defendant had been lawfully seized under the *Summers* rule, our Supreme Court noted that the application of the second and third prongs was "straightforward," and thus focused its inquiry on the first prong, i.e., whether the defendant's brief detention was justified on the ground that he was an "occupant" of the premises during the execution of a search warrant. *Id.* at 924-25, 821 S.E.2d at 815.

The United States Supreme Court adopted the *Summers* rule based in part upon the rationale that "[i]f the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search [her] home." *Summers*, 452 U.S. at 704-05, 69 L. Ed. 2d at 351. Our Supreme Court noted, however, that beyond enumerating the governmental interests that combine to justify a *Summers* detention, the United States Supreme Court had yet to "directly resolve[ ] the issue of who qualifies as an 'occupant' for the purposes of the . . . rule." *Wilson*, 371 N.C. at 925, 821 S.E.2d at 815.

In attempting to answer this question, the *Wilson* Court examined the various rationales underlying the *Summers* rule. The Court ultimately concluded that a person is an "occupant" for purposes of the rule "if he poses a real threat to the safe and efficient execution of a search warrant." *Id.* (quotation marks omitted); *see also Bailey v. United States*, 568 U.S. 186, 195, 185 L. Ed. 2d 19, 29-30 (2013) ("When law enforcement officers execute a search warrant, safety considerations require that they secure the premises, which may include detaining current occupants. By taking unquestioned command of the situation, the officers can search without fear that occupants, who are on the premises and able to observe the course of the search, will become disruptive, dangerous, or otherwise frustrate the search." (citation and quotation marks omitted)). Thus, under this formulation of the rule, our Supreme Court noted that although a defendant may not be "an *occupant* of the premises being searched in the ordinary sense of the word," *Wilson*, 371 N.C. at 925, 821 S.E.2d at 815, the defendant's "own actions" may nevertheless "cause[ ] him to satisfy the first part, the 'who,' " of a lawful *Summers* detention. *Id.* at 926, 821 S.E.2d at 816.

Applying this definition, although the defendant was not inside the premises when the officers arrived to execute the search warrant, our Supreme Court concluded that the defendant's own actions had nevertheless rendered him an "occupant," thereby subjecting him to a suspicionless seizure incident to the lawful execution of the search warrant. The Supreme Court reasoned:

> We believe defendant posed a real threat to the safe and efficient execution of the search warrant in this case. He approached the house being swept, announced his intent to retrieve his moped from the premises, and appeared to be armed. It was obvious that defendant posed a threat to the safe completion of the search. . . . [I]t was apparent to [the officer] that defendant was attempting to enter the area being searched—or, stated another way, defendant would have *occupied* the area being searched if he had not been restrained.

Id. at 925, 821 S.E.2d at 815. Because the defendant's initial detention, lawful under the *Summers* rule, did not taint the subsequent search, no Fourth Amendment violation occurred, and the Supreme Court therefore affirmed the trial court's denial of his motion to suppress.

III. Application

In the instant case, there is no question but that the third prong of the *Summers* rule—the "when"—is satisfied, in that the officers detained Defendant during their lawful execution of a warrant to search his girlfriend's apartment. Moreover, given the apartment's proximity to the street on which Defendant's vehicle was parked, it is also arguable that the circumstances here satisfied the second prong—the "where"—of the *Summers* rule. *See id.* at 924, 821 S.E.2d at 815 ("It is also evident that defendant was seized within the immediate vicinity of the premises being searched."). We conclude, however, that Defendant was not an "occupant" of the searched premises, as that term is defined in *Wilson*, so as to satisfy the first prong—the "who"—of a lawful *Summers* detention.

Defendant was cleaning his vehicle in the street when officers arrived to execute the search warrant. The officers approached Defendant to question him. Defendant remained inside his vehicle and told the officers that he did not live in the apartment, but that his girlfriend did. At no point did Defendant attempt to approach the apartment. Nor did he exhibit nervousness or agitation, disobey or protest the officers' directives, appear to be armed, or undertake to interfere with the search.[3] *Cf. id.* at 925-26, 821 S.E.2d at 816 ("Indeed, if such precautionary measures [such as erecting barricades or posting someone at the door] did

3. The dissent appears to argue that Defendant's detention was justified, in part, upon his girlfriend "identif[ying] him as the supplier of the drugs that were the target of the search." *Dissent* at 7. This is obviously irrelevant, as Defendant had already purportedly been "seized" by the time the officers learned this information.

not carry with them some categorical authority for police to detain individuals *who attempt to circumvent them*, it is not clear how officers could practically search without fear that occupants, who are on the premises and able to observe the course of the search, would become disruptive, dangerous, or otherwise frustrate the search." (emphasis added) (quotation marks omitted)). Quite simply, there were no circumstances to indicate that Defendant would pose "a real threat to the safe and efficient execution" of the officers' search.[4] *Id.* at 925, 821 S.E.2d at 815.

To hold that Defendant's presence in his vehicle under these circumstances was sufficient to render him an "occupant" of the apartment for purposes of the *Summers* rule would afford the State the wide discretion to detain any unlucky bystander, simply because he or she happens to be familiar with a resident of the premises being searched.[5] Nevertheless, the dissent maintains that "[t]he Court in Wilson addressed [this] main concern when it limited law enforcement's ability to detain only those who are within 'the immediate vicinity of the premises to be searched.' " *Dissent* at 5. This contention is misplaced. Nor is the same eliminated by virtue of Defendant's "connection to the apartment." *Id.* at 6.

The dissent's suggestion that a defendant's presence in the immediate vicinity of a searched premises should operate categorically to satisfy the first prong of the *Summers* rule would render entirely superfluous our Supreme Court's scrupulous effort in *Wilson* to define "occupant" as someone who "poses a real threat to the safe and efficient execution of a search warrant." *Wilson*, 371 N.C. at 925, 821 S.E.2d at 815. To be sure, in arriving at its definition of "occupant" for purposes of the first prong of *Summers*, the *Wilson* Court used as a "guidepost" that same reasoning which underlies the lawful spatial dimension of a *Summers* detention under the second prong. *Id.* ("The reasoning in *Bailey* comports with the justification in *Summers* because someone who is sufficiently close to the premises being searched *could* pose just as real a threat to officer safety and to the efficacy of the search as someone who is within the premises."). Such *guidance*, however, does not amount to a holding that an individual's presence within the immediate vicinity of a search, by its very nature, poses a threat to the search's safe and efficient execution.

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4. The dissent would also conclude that Defendant posed a threat "to the efficacy of the search, as CMPD resources were diverted away from the execution of the search to prevent any potential interference by Defendant[.]" *Dissent* at 6. This circular argument is a logical fallacy.

5. Such a precedent would be particularly concerning given the prevalence of neighborhoods in which family members live within close proximity to one another.

Had the Supreme Court intended such a rule, it would have had no reason to examine the particular circumstances in order to analyze whether the defendant in that case had, in fact, posed "a *real* threat to the safe and efficient execution of [the] search warrant." *Id.* (emphasis added) ("We believe defendant posed a real threat to the safe and efficient execution of the search warrant in this case. He approached the house being swept, announced his intent to retrieve his moped from the premises, and appeared to be armed. . . . Defendant argues that he was not an *occupant* of the premises being searched in the ordinary sense of the word. Given defendant's actions here, however, it was apparent to [the officer] that defendant was attempting to enter the area being searched—or, stated another way, defendant would have *occupied* the area being searched if he had not been restrained."). Moreover, although both factors were present, our Supreme Court's holding in *Wilson* was not based, even in part, upon either the defendant's "connection" to the premises or his proximity thereto. *Id.*

Thus, under the dissent's logic—where the second prong of *Summers* is the only meaningful requirement—*Summers* would still boundlessly subject to detention any grass-mowing uncle, tree-trimming cousin, or next-door godson checking his mail, merely based upon his "connection" to the premises and hapless presence in the immediate vicinity. We do not interpret *Summers* or *Wilson* as creating such a sweeping exception to the Fourth Amendment's proscription against unreasonable seizures. Nor are we able to perceive any line which might practically be drawn to curtail this tremendous discretion, beyond that which our Supreme Court has already set forth. *See id.* ("[A] person is an occupant for the purposes of the *Summers* rule if he poses a *real threat to the safe and efficient execution* of [the] search warrant." (emphasis added) (quotation marks omitted)).

Accordingly, assuming that there was one, we conclude that Defendant's suspicionless seizure in the instant case cannot be justified on the ground that he was an "occupant" of the premises during the lawful execution of a search warrant. Therefore, we vacate the judgment entered upon the denial of Defendant's motion to suppress, and remand the matter to the trial court for entry of an order containing findings of fact necessary to resolve all material factual disputes, pursuant to our holding in *Thompson I*. *See Thompson I*, ___ N.C. App. at ___, 809 S.E.2d at 349 ("In this case, the trial court's findings of fact do not resolve the question of whether the law enforcement officers returned defendant's license after examining it, or instead retained it, or the issue of the sequence of events and the time frame in which they occurred.").

In addition, we reiterate our decision in *Thompson I* to remand for correction of the discrepancy between the transcript of Defendant's plea and the judgment entered against him. *Id.* at ___, 809 S.E.2d at 350.

VACATED AND REMANDED.

Chief Judge McGEE concurs.

Judge BERGER dissents by separate opinion.

BERGER, Judge, dissenting.

This case is before us again on remand from the Supreme Court of North Carolina with instructions to reconsider this matter in light of *State v. Wilson*, 371 N.C. 920, 821 S.E.2d 811 (2018). *State v. Thompson*, ___ N.C. ___, 822 S.E.2d 616 (2019). I continue to believe that no seizure occurred. *See State v. Thompson*, ___ N.C. App. ___, 809 S.E.2d 340 (2018) (*Thompson I*) (Berger, J., dissenting). Following the Supreme Court's instructions and assuming, *arguendo*, that a seizure did occur, I respectfully dissent.

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citation omitted). Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

"The question for review is whether the ruling of the trial court was correct and not whether the reason given therefore is sound or tenable." *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987) (citation omitted). "[A] correct decision of a lower court will not be disturbed because a wrong or insufficient or superfluous reason is assigned." *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957) (citation omitted).

> The burden on appeal rests upon Defendant to show the trial court's ruling is incorrect. . . . the State's failure to raise the . . . issue at the hearing does not compel nor permit

> this Court to summarily exclude the possibility that the trial court's ruling was correct under this or some other doctrine or rationale. . . . Our precedents clearly allow the party seeking to uphold the trial court's presumed-to-be-correct and "ultimate ruling" to, in fact, choose and run any horse to race on appeal to sustain the legally correct conclusion of the order appealed from.

State v. Hester, ___ N.C. App. ___, ___, 803 S.E.2d 8, 16 (2017) (*purgandum*).

On remand, we have been instructed to review this case in light of *Wilson* which states:

> a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain (1) the occupants, (2) who are within the immediate vicinity of the premises to be searched, and (3) who are present during the execution of a search warrant . . . . These three parts roughly correspond to the "who," "where," and "when" of a lawful suspicionless seizure incident to the execution of a search warrant.

State v. Wilson, 371 N.C. 920, 923, 821 S.E.2d 811, 815 (2018) (*purgandum*). I disagree with the majority's conclusion that, assuming Defendant was in fact seized, such seizure cannot be justified upon the ground that he was an "occupant of the premises" during the execution of a search warrant.

Our Supreme Court has defined the term occupant to be one who "poses a real threat to the safe and efficient execution of a search warrant." *Id.* at 925, 821 S.E.2d at 815 (citation omitted). The threat does not have to be immediately present during the execution of the search warrant. As the Court in *Wilson* noted, "someone who is sufficiently close to the premises being searched *could* pose just as real a threat to officer safety and to the efficacy of the search as someone who is within the premises." *Id.* Sufficient proximity to the premises being searched allows for the mere possibility of interference with the search, which *could* result in potential harm to officers and a less efficient execution of the search warrant.

This potential for interference and harm has led to "the Supreme Court's recognition that officers may constitutionally mitigate the risk of someone entering the premises during a search 'by taking routine precautions, for instance by erecting barricades or posting someone on the

perimeter or at the door.' " *Id.* (quoting *Bailey v. United States*, 568 U.S. 186, 195 (2013)).

> Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence . . . [and] the risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.

Michigan v. Summers, 452 U.S. 692, 702-03 (1980).

Officers must have the authority to mitigate risks during the execution of a search warrant. Without such authority, "it is not clear how officers could practically 'search without fear that occupants, who are on the premises and able to observe the course of the search, [would] become disruptive, dangerous, or otherwise frustrate the search.' " *Wilson*, 371 N.C. at 926, 821 S.E.2d at 816 (alteration in original) (quoting *Bailey*, 568 U.S. at 195).

The majority seems to be concerned that if mere presence in the "immediate vicinity" of a search is sufficient for someone to be an "occupant," and subject to lowered Fourth Amendment protections, this would justify detaining "any unlucky bystander." Perhaps confident that Defendant did not pose a threat to law enforcement, the majority declines to acknowledge that an individual within "immediate vicinity" of the area to be searched is a real threat to safe and efficient execution of a search warrant. In addition, the majority ignores the fact that the target of the search identified Defendant as her drug supplier.

The majority opinion jeopardizes the safety of law enforcement officers across this State. While the majority is content to focus on the coolness and calmness of Defendant, law enforcement officers should not be required to gamble with their lives because an individual within the immediate vicinity simply *looked* calm. The majority elevates hyper-technical Monday-morning quarterbacking over common sense. We should be reminded that "courts should credit the practical experience of officers who observe on a daily basis what transpires on the street, so as to avoid indulging in unrealistic second-guessing of law enforcement judgment calls." *State v. Mangum*, ___ N.C. App. ___, ___, 795 S.E.2d 106, 118 (2016) (*purgandum*).

The Court in *Wilson* addressed the majority's main concern when it limited law enforcement's ability to detain only those who are within

"the immediate vicinity of the premises to be searched." *Wilson*, 371 N.C. at 924, 821 S.E.2d at 815. The *Wilson* Court adopted the limitations from *Bailey* to circumscribe law enforcement's authority to detain occupants, and the Court listed factors to be considered "to determine whether an occupant was detained within the immediate vicinity of the premises to be searched, including the lawful limit of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors." *Id.* (quoting *Bailey*, 568 U.S. at 201).

Officer safety has justified the broad discretion for law enforcement to use detention as a measure of mitigation and protection during the execution of a search warrant. The United States Supreme Court found that "[a]n officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.' " *Muehler v. Mena*, 544 U.S. 93, 98 (2005) (quoting *Summers*, 452 U.S. at 705, n. 19). "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her [possessions]." *Id.* at 101 (first alteration in original) (citation omitted).

Here, in their lawful search for drugs, a situation which can often give rise to "sudden violence," CMPD officers "exercise[d] unquestioned command of the situation." *Summers*, 452 U.S. at 703. Defendant was engaged by officers to determine who he was, to prevent any potential interference by Defendant, and to keep officers safe. After discovering Defendant's connection to the apartment—that he was visiting his girlfriend who lived there and who was the subject of the search warrant—CMPD officers were not willing to risk any potential interference or harm by Defendant.

His proximity and connection to the apartment being searched "pose[d] just as real a threat to officer safety and to the efficacy of the search as someone who [was] within the premises." *Wilson*, 371 N.C. at 925, 821 S.E.2d at 815. The nature of the search and Defendant's proximity to the apartment gave rise for officers to believe Defendant *could* pose a threat to the safety of the search. Upon learning that Defendant was the subject's boyfriend and supplier, Defendant required officer attention because he was a threat, not only to the efficacy of the search, as CMPD resources were diverted away from the execution of the search to prevent any potential interference by Defendant, but to officer safety. Therefore, Defendant was an occupant of the premises to be

searched pursuant to *Wilson*, and CMPD officers detention of Defendant was appropriate in their effort to mitigate risk.

Applying the *Bailey* factors to determine whether Defendant was within the immediate vicinity or not, there is no question that he was both "within the line of sight" of the dwelling to be searched and could have easily gained entry from his location. *Bailey*, 568 U.S. at 201.

As noted before, Defendant stated his purpose for being there was to visit his girlfriend, the target of the search. Officers could infer that he had been there before and was familiar with the surrounding areas and layout of the apartment. Defendant told police during his interrogation after arrest that he had slept at the residence the previous night. He was well within the line of sight of the apartment being searched, located "directly in front of the walkway that would lead to the residence." Additionally, while law enforcement was searching the apartment, his girlfriend *saw* him outside and identified him as the supplier of the drugs that were the target of the search. Defendant's location at the end of the walkway leading to the apartment, and the girlfriend's ability to identify him from inside the residence show Defendant's being "within the line of site" and therefore within the immediate vicinity.

Defendant "*could* [have] pose[d] just as real a threat to officer safety and to the efficacy of the search as someone who [was] within the premises." *Wilson*, 371 N.C. at 925, 821 S.E.2d at 815. Pursuant to *Wilson*, Defendant was an occupant of the premises. Defendant was within the line of sight of the apartment being searched, and was a threat to enter or attempt to enter the premises. Thus, Defendant was located within the "immediate vicinity of the premises to be searched," *Bailey*, 568 U.S. at 199, and subject to detention.

The trial court did not err in denying Defendant's motion to suppress. Even assuming a seizure occurred, it was justified under *Wilson* because CMPD officers had authority to detain Defendant as an occupant of the premises who was in the immediate vicinity. I would affirm the trial court.

VOLIVA v. DUDLEY

[267 N.C. App. 116 (2019)]

DOROTHY P. VOLIVA, PLAINTIFF
v.
CHARLES DUDLEY AND WENDY CHLOE GREWE, DEFENDANTS

No. COA19-58

Filed 20 August 2019

Contracts—validity—promissory note—executed by beneficiaries of estate—in favor of executrix—fiduciary duty

There was a genuine issue of material fact as to the validity of a promissory note that made defendants (beneficiaries of an estate) liable to plaintiff (executrix of the estate) for $15,000 "for value received" where the parties filed contradictory affidavits regarding defendants' allegations that plaintiff said she would not allow an in-kind conveyance of real property in place of the will's contemplated sale of the property unless defendants executed the promissory note in her favor. If the factfinder were convinced that plaintiff demanded the promissory note in exchange for an agreement to perform her duties as executrix, the note could be set aside for plaintiff's breach of her fiduciary duty to the beneficiaries of the estate.

Appeal by Defendants from order entered 6 September 2018 by Judge Robert P. Trivette in Currituck County District Court. Heard in the Court of Appeals 9 May 2019.

Trimpi & Nash, LLP, by John G. Trimpi, for Plaintiff-Appellee.

Sharp, Graham, Baker & Varnell, LLP, by Casey C. Varnell, for Defendants-Appellants.

COLLINS, Judge.

Defendants Charles Dudley and Wendy Chloe Grewe appeal from an order denying their motion to dismiss and motion for judgment on the pleadings made pursuant to North Carolina Rules of Civil Procedure 12 and 56, and granting Plaintiff's motion for summary judgment made pursuant to Rule 56 on Plaintiff's cause of action alleging breach of contract. Defendants contend that the trial court erred by granting Plaintiff's motion for summary judgment because genuine issues of material fact exist that preclude summary judgment in Plaintiff's favor, and that the trial court erred by denying Defendants' motion for judgment on the pleadings because the purported contract was illegally procured and

unenforceable as a matter of law. We reverse and remand in part and affirm in part.

I. Background

Amy Cassandra Dudley Payne died testate in April 2013, naming Plaintiff as the desired executrix of her estate. On 7 May 2013, Plaintiff filed an application for probate and letters testamentary with the Clerk of Superior Court. The Clerk probated the Payne will and issued Plaintiff letters testamentary the same day.

The Payne will provided, in relevant part, that Plaintiff was to sell certain real property owned by the decedent and to distribute the net proceeds of the sale equally amongst the three beneficiaries: Tony Voliva, Defendant Dudley, and Defendant Grewe (collectively, the "Beneficiaries"). On 11 March 2014, pursuant to the desires of the Beneficiaries, Plaintiff and the Beneficiaries filed a verified petition in the Superior Court seeking the court's permission to allow Plaintiff to deviate from the terms of the will by foregoing the contemplated sale and conveying the real property to the Beneficiaries instead. The Superior Court entered an order on 12 March 2014 allowing the deviation and the conveyance. Plaintiff had the real property surveyed and divided into three parcels, and conveyed one parcel to each of the Beneficiaries.

On 2 December 2014, Plaintiff filed an application in the Superior Court seeking an executor's commission of $4,504.38, which amounted to five percent of the total receipts and disbursements of the Payne estate. The Clerk entered an order the same day granting Plaintiff the commission she sought. On 7 February 2018, Plaintiff filed a final account in the Superior Court, and the Clerk approved the final account on 12 February 2018.

On 7 March 2018, Plaintiff filed a complaint in the District Court (the "trial court") seeking to enforce the terms of a promissory note executed by the Beneficiaries on 24 January 2014 (the "Note"), which Plaintiff attached as an exhibit to her complaint. Per the terms of the Note, the Beneficiaries became jointly and severally liable to Plaintiff in the amount of $15,000 "FOR VALUE RECEIVED." The Note does not reference the Payne will or otherwise describe what value was provided in exchange for the Beneficiaries' promise to pay. In the complaint, Plaintiff alleges that Tony Voliva, who is her son, is the only beneficiary who has paid her anything under the Note. Plaintiff seeks to enforce the Note against Defendants only, and seeks the balance of the principal due on the Note plus interest, attorney's fees, and costs.

On 15 May 2018, Defendants filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), and answered the complaint, raising the defenses of lack of consideration; fraud, duress, and undue influence; and unclean hands. Defendants' motion to dismiss and answer included a number of factual allegations, including that "[t]he entire claim of the Plaintiff and alleged consideration for the subject promissory note stems directly from" the probate of the Payne will, and that after Defendants "suggested" to Plaintiff that they preferred the partition and conveyance of the real property to the sale, "Plaintiff informed the Defendants that [Plaintiff] would not agree to or allow an in-kind partition of the Property unless and until the Defendants executed" the Note. On 13 July 2018, Defendants filed a motion for judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(c) and 56, arguing that there exist no genuine issues of material fact and that Defendants were entitled to judgment as a matter of law.

On 31 July 2010, Plaintiff filed a motion for summary judgment under Rule 56, arguing that there exist no genuine issues of material fact and that Plaintiff was entitled to judgment as a matter of law. Plaintiff attached to her motion for summary judgment two affidavits: one of her own, and one executed by William Brumsey, III, the attorney who both helped Plaintiff administer the Payne estate and drafted the Note on behalf of the Beneficiaries. In her own affidavit, Plaintiff states that she "never spoke to or had any conversation with either of the defendants pertaining to the transaction in question or the [Note]," and that the Note was "the result of a negotiated settlement arrangement between [Tony Voliva] and the two defendants in this action."

On 13 August 2018, Defendants filed verifications in which they stated that the 15 May 2018 motion to dismiss and answer "is true of [their] own knowledge, except as to those matters and things stated on information and belief," which Defendants stated they believed to be true.

On 6 September 2018, the trial court entered an order (1) granting Plaintiff's motion for summary judgment, (2) denying Defendants' motions, and (3) ordering Defendants to pay Plaintiff damages, attorney's fees, and costs. Defendants timely appealed.

II. Discussion

Defendants contend that the trial court erred by (1) granting Plaintiff's motion for summary judgment because genuine issues of material fact exist that preclude summary judgment in Plaintiff's favor and (2) denying

Defendants' motion for summary judgment[1] because the purported contract was illegally procured and unenforceable as a matter of law.

a. Standard of review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56 (2018). "The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Const. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). We review a trial court's order granting or denying summary judgment *de novo*. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012).

b. Analysis

This is an action alleging breach of contract.[2] "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 216, 768 S.E.2d 582, 590 (2015) (citation omitted). The questions for this Court are therefore (1) whether the trial court properly concluded that Plaintiff succeeded in meeting her burden of establishing that the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there exist no genuine issues of material fact regarding whether (a) the Note is a valid contract and (b) Defendants breached the Note, and that Plaintiff was accordingly entitled to judgment as a matter of law, and (2) whether the trial court properly concluded that Defendants failed in meeting their burden of establishing that the same documents show there exist no genuine issues of material fact regarding the same issues and that Defendants are entitled to judgment as a matter of law.

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1. As the parties each recognize in their briefs, the fact that the trial court was presented with evidence outside of the pleadings (e.g., Defendants' verified factual allegations in their 15 May 2018 motion to dismiss and answer) and did not exclude said evidence converted Defendants' motion for judgment on the pleadings into a motion for summary judgment. *See* N.C. Gen. Stat. § 1A-1, Rules 12(c) and 56.

2. Defendants do not contest Plaintiff's standing to bring suit under the Note. While not herself a party to the Note, since she was the intended beneficiary of the Note, Plaintiff may bring suit under the Note pursuant to the third-party beneficiary doctrine. *See Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 651, 407 S.E.2d 178, 181 (1991) (discussing third-party beneficiary doctrine).

Defendants admit that they signed the Note obligating them to pay Plaintiff, and do not allege that they have paid Plaintiff anything pursuant thereto. Defendants' breach of the Note is therefore not in dispute.

Defendants argue, however, that the Note is unenforceable for lack of consideration and because of fraud/duress/undue influence attributable to Plaintiff,[3] and that the Note is therefore not a valid contract. The gravamen of Defendants' argument is that Plaintiff, as executrix of the Payne estate, had a fiduciary duty to Defendants, as beneficiaries of the Payne will, and that Plaintiff breached her duty by demanding that Defendants execute the Note in her favor in exchange for her agreement to support the in-kind conveyance of the real property.

An executrix is a fiduciary to the beneficiaries of the estate she administers. *See Fortune v. First Union Nat'l Bank*, 323 N.C. 146, 149, 371 S.E.2d 483, 485 (1988); N.C. Gen. Stat. § 32-2(a) (2018). "Fiduciaries must act in good faith. They can never paramount their personal interest over the interest of those for whom they have assumed to act." *Miller v. McLean*, 252 N.C. 171, 174, 113 S.E.2d 359, 362 (1960). "Both by law and the words of h[er] oath [an executrix] must faithfully execute the trust imposed in [her]. [Sh]e must be impartial. [Sh]e cannot use [her] office for [her] personal benefit." *In re Will of Covington*, 252 N.C. 551, 553, 114 S.E.2d 261, 263 (1960).

If able to convince the factfinder that Plaintiff demanded the Note in exchange for an agreement to perform her duties as executrix in violation of a fiduciary duty owed to them, Defendants could have the Note set aside, e.g., under the doctrine of constructive fraud. *See Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A.*, 219 N.C. App. 615, 620, 730 S.E.2d 763, 767 (2012) ("To establish constructive fraud, a plaintiff must show that defendant (1) owes plaintiff a fiduciary duty; (2) breached this fiduciary duty; and (3) sought to benefit h[er]self in the transaction."); *Mehovic v. Mehovic*, 133 N.C. App. 131, 135, 514 S.E.2d 730, 733 (1999) ("a party alleging fraud must elect either the remedy of rescission or that of damages").

Defendants filed verifications of their motion to dismiss and answer, in which they swore on personal knowledge that Plaintiff told Defendants she would not allow the in-kind conveyance of the real

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3. Defendants make no arguments regarding unclean hands in their brief, and we accordingly consider that issue abandoned for purposes of this appeal. N.C. R. App. P. 28(b)(6) (2018) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

property unless Defendants executed the Note in her favor. Defendants' verifications satisfy the requisite criteria to be treated as an affidavit for purposes of summary judgment. *See Daniel v. Daniel*, 132 N.C. App. 217, 219, 510 S.E.2d 689, 690 (1999) ("A verified pleading may be treated as an affidavit for summary judgment purposes if it: (1) is made on personal knowledge; (2) sets forth such facts as would be admissible into evidence[4]; and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." (citing Rule 56(e)).

Plaintiff subsequently filed affidavits of her own, however, denying Defendants' allegations and asserting that she never spoke with Defendants regarding the Note. The parties' contradictory affidavits create genuine issues of fact which, if material, preclude summary judgment. *Hyde v. Taylor*, 70 N.C. App. 523, 528, 320 S.E.2d 904, 907 (1984).

The question of whether Plaintiff demanded the Note in exchange for supporting the in-kind conveyance of the real property is material to the question of the Note's validity and enforceability. By virtue of the material uncertainty concerning the way the Note came into being[5] created by the parties' contradictory affidavits, there thus exist genuine

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4. While the parol evidence rule "prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is used to contradict, vary, or explain the written instrument[,]" *Carolina First Bank v. Stark, Inc.*, 190 N.C. App. 561, 568, 660 S.E.2d 641, 646 (2008) (citation omitted), parol evidence is admissible to establish contract defenses like those raised by Defendants. *See Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 437 n.3, 617 S.E.2d 664, 670 n.3 (2005) ("[T]he parol evidence rule does not bar the admission of parol evidence to prove that a written contract was procured by fraud because the allegations of fraud challenge the validity of the contract itself, not the accuracy of its terms." (internal quotation marks, brackets, and citation omitted)); Restatement (Second) of Contracts § 214(d) (1981) (parol evidence admissible to prove "illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause.").

5. Plaintiff asserts in her affidavit that it is her understanding that the Note was one aspect of an agreement between the Beneficiaries to petition the trial court for the in-kind conveyance. Plaintiff's understanding of what the Beneficiaries agreed to is not based upon Plaintiff's personal knowledge, however, and therefore is not properly considered in adjudging the propriety of summary judgment. N.C. Gen. Stat. § 1A-1, Rule 56(e). But if Plaintiff is able to prove at trial that Tony Voliva demanded that Defendants execute the Note in exchange for his agreement to join the petition for the in-kind conveyance, the Note could be enforced as a valid third-party beneficiary contract. *See Wachovia Bank & Trust Co. v. Allen*, 232 N.C. 274, 279, 60 S.E.2d 117, 120-21 (1950) ("Where land is directed to be converted into money . . . all the parties entitled beneficially thereto have the right to take the property in its unconverted form, and thus prevent the actual conversion thereof, and this right to take the realty instead of the proceeds is not limited to beneficiaries who also hold the legal title. *In the case of land, the election of one of the beneficiaries alone will not change the character of the estate; all the persons so beneficially interested must join, and all must be bound.*") (emphasis added) (quotation marks and citation omitted).

issues of material fact regarding the validity of the Note Plaintiff seeks to enforce, and we accordingly conclude that the trial court (1) erred by granting Plaintiff's motion for summary judgment and (2) did not err by denying Defendants' motion for summary judgment.

III. Conclusion

Because genuine issues of material fact exist regarding whether the Note is a valid and enforceable contract, we reverse the trial court's grant of Plaintiff's motion for summary judgment, affirm the trial court's denial of Defendants' motion for summary judgment, and remand to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED IN PART AND AFFIRMED IN PART.

Judges DIETZ and MURPHY concur.

HENRY C. WATKINS, Plaintiff
v.
JENNIFER L. BENJAMIN (f/k/a Watkins), Defendant

No. COA18-894

Filed 20 August 2019

Child Custody and Support—modification—existing order—requiring a different parent to pay support

The trial court did not err by exercising jurisdiction over a child support dispute where the trial court's order was a modification of an existing child support order, rather than an establishment of a new one. A child support order is not confined to the obligations of one specific parent, so the new order requiring plaintiff to make child support payments modified the existing order that required defendant to make child support payments.

Appeal by Defendant from orders entered 28 December 2017 and 25 January 2018 by Judge Ward D. Scott in Buncombe County District Court. Heard in the Court of Appeals 23 May 2019.

Jackson Family Law, by Jill Schnabel Jackson, for Plaintiff-Appellee.

Jonathan McGirt for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from the trial court's (1) 28 December 2017 order establishing child support obligations and settling arrearage issues between the parties and (2) 25 January 2018 order denying Defendant's motions pursuant to North Carolina Rules of Civil Procedure 59 and 60 seeking to modify the 28 December 2017 order. Defendant contends that the trial court erred by exercising subject matter jurisdiction over the child support dispute in the 28 December 2017 order, and that both the 28 December 2017 and 25 January 2018 orders should be vacated (the latter as moot) as a result. We affirm.

I. Background

The parties married in October 1996, separated in August 2012, and divorced in April 2014. Two children were born of the marriage, and the family lived together in Buncombe County.

In April 2013, following the parties' separation, Defendant and the children relocated to Virginia. On 19 August 2013, Plaintiff filed a complaint in Buncombe County District Court seeking equitable distribution of the marital estate and joint custody of the children. Defendant answered on 14 February 2014, and asserted a number of counterclaims including, *inter alia*, a claim for child support. Plaintiff replied, asserted affirmative defenses, and moved to dismiss on 3 April 2014, conceding that he "owe[d] a duty of support to the minor children."

The trial court entered a temporary consent order on 17 July 2014 awarding the parties joint custody of the children and awarding primary placement of the children to Plaintiff in Buncombe County. On 6 February 2015, the trial court entered an order that, *inter alia*, denied both parties' claims for temporary child support, and reserved the issues of retroactive and prospective child support for subsequent determination. The trial court entered an order on 25 August 2015 that, *inter alia*, dismissed both parties' pending claims for retroactive child support, held that no child support arrears existed as of 1 August 2015, and reserved the issues of child custody and prospective child support for subsequent determination.

On 9 October 2015, the trial court entered an order that, *inter alia*, found that Defendant had relocated to Maryland, awarded custody of the children to Plaintiff; and ordered Defendant to pay Plaintiff child support (including arrears) and temporary prospective child support. The trial court entered an order on 22 March 2016 that, *inter alia*,

calculated the arrears owed to Plaintiff by Defendant, set Defendant's permanent prospective child support obligation to Plaintiff, and set forth certain prospective expenses to be shared by the parties. Plaintiff applied for child support services from the Buncombe County Child Support Enforcement Agency, which moved to intervene on 27 May 2016. On 28 June 2016, the trial court entered an order that, *inter alia*, allowed the intervention and recalculated the child support arrears owed to Plaintiff by Defendant.

Defendant filed a motion to modify the child custody arrangement and to hold Plaintiff in civil contempt on 4 October 2016. The trial court entered a contempt citation and order to show cause on 6 October 2016. On 3 January 2017, the trial court entered a consent order that reflected the parties' agreement to, *inter alia*: (1) modify the custody arrangement such that the parties would share joint custody of the children, and award primary placement of the children to Defendant; (2) settle Defendant's pending claims in the action; (3) reserve Plaintiff's rights to recover retroactive child support from Defendant; and (4) have the trial court and the State of North Carolina "retain jurisdiction over the parties and the minor children in regards to child custody and child support issues" and "future modification of" the orders enforcing the trial court's rulings on those issues.

Sometime in early 2017, Defendant filed a complaint seeking child support from Plaintiff in the Circuit Court of Baltimore County, Maryland (the "Maryland action"). Plaintiff moved to dismiss, and the Maryland court dismissed Defendant's Maryland action on 9 June 2017, concluding that it lacked personal jurisdiction over Plaintiff. On 13 November 2017, Defendant filed a petition with the Maryland court to have the dismissal of the Maryland action reviewed, and Defendant's petition was apparently granted and remained pending as of the time the orders at issue in this appeal were entered.

On 19 May 2017—after she filed the Maryland action, and before the Maryland court dismissed the same—Defendant moved the trial court (i.e., the Buncombe County District Court) to modify the child support obligations between the parties to reflect the modified custody arrangement, specifically arguing that "substantial changes in circumstances [] ha[d] occurred[.]"

On 10 August 2017, Plaintiff moved the trial court to "review [] the current order of child support" and to "determine an appropriate award of support and an appropriate manner of crediting the arrears due from Defendant to Plaintiff." Plaintiff stated that the children were with

Defendant in Maryland, but did not allege that a substantial change in circumstances had taken place.

The trial court entered a consent order on 7 November 2017 granting Defendant's request to voluntarily dismiss the 19 May 2017 motion without prejudice. Defendant paid the arrears she owed to Plaintiff in full on 9 November 2017.

The trial court held a hearing on 14-15 November 2017 on Plaintiff's 10 August 2017 motion to clarify the child support obligations owed by the parties. At the hearing, Defendant moved to dismiss due to the pendency of the Maryland court's review of the dismissal of the Maryland action. The trial court denied Defendant's motion.

The trial court entered the child support order here at issue on 28 December 2017. In its 28 December 2017 order, the trial court, *inter alia*: (1) found that "North Carolina retains ongoing, exclusive jurisdiction of the matters of custody and support of the minor children[,]" even though the children resided with Defendant in Maryland; (2) ordered Plaintiff to make child support payments going forward; and (3) decreed that the order "resolve[d] all pending matters of child support[and] arrears[] by and between the parties."

On 8 January 2018, Defendant moved the trial court under N.C. Gen. Stat. § 1A-1, Rules 59 and 60, to amend the 28 December 2017 order after consideration of Defendant's draft proposed order, which the trial court agreed to consider. On 25 January 2018, the trial court entered an order denying Defendant's Rule 59 and 60 motions and dismissing them with prejudice. Defendant timely appealed both the 28 December 2017 and 25 January 2018 orders.

II. Discussion

Defendant contends that the trial court erred by exercising subject matter jurisdiction over the child support issue in the 28 December 2017 order, and that the 25 January 2018 order is moot as a result.

a. Standard of Review

We review a trial court's exercise of subject matter jurisdiction *de novo*. *Keith v. Wallerich*, 201 N.C. App. 550, 554, 687 S.E.2d 299, 302 (2009).

b. Analysis

The Uniform Interstate Family Support Act ("UIFSA"), codified at N.C. Gen. Stat. § 52C (2017), contains a provision that sets forth whether a state has jurisdiction over a support dispute when there exist multiple

support proceedings pending simultaneously in multiple states: N.C. Gen. Stat. § 52C-2-204 ("Simultaneous Proceedings"). N.C. Gen. Stat. § 52C-2-204(a) specifically concerns when a "tribunal of this State may exercise jurisdiction to *establish* a support order"—as opposed to the state's jurisdiction to *modify* an existing support order—and sets forth certain deadlines for filing a support petition which a litigant must meet if it seeks to have a state exercise jurisdiction over the petition. *Id.* (emphasis added).

Defendant argues that, pursuant to N.C. Gen. Stat. § 52C-2-204(a), the trial court lacked subject matter jurisdiction over the child support issue in the 28 December 2017 order. Specifically, Defendant argues that since Plaintiff did not owe Defendant child support on 28 December 2017, the 28 December 2017 order setting Plaintiff's obligation to Defendant was the *establishment* of a new child support order, rather than the *modification* of the existing child support order (as last modified on 28 June 2016) which previously obligated Defendant to pay Plaintiff. Since no child support obligation flowing from Plaintiff to Defendant had been established as of 28 December 2017, Defendant's argument continues, the facts that (1) Defendant filed the Maryland action in early 2017 to establish Plaintiff's child support obligation to Defendant and (2) Plaintiff did not move the trial court until 10 August 2017 to clarify Plaintiff's obligation to Defendant—which was beyond the time Maryland law allowed Plaintiff to file a responsive pleading contesting Maryland's exercise of jurisdiction—mean that North Carolina was not authorized to exercise jurisdiction over the child support issue on 28 December 2017 under N.C. Gen. Stat. § 52C-2-204(a).

Defendant does not argue that the trial court lacked jurisdiction to modify its existing orders, such that we need not analyze whether Plaintiff met N.C. Gen. Stat. § 52C-2-204(a)'s filing deadlines unless we decide that the 28 December 2017 order was the *establishment* of a new support order rather than a *modification* of an existing support order. A threshold question is therefore whether the trial court's 28 December 2017 order was, in fact, the establishment of a new child support order under UIFSA as Defendant suggests.

Neither "establishment" nor "modification" are expressly defined in UIFSA's "Definitions" section, N.C. Gen. Stat. § 52C-1-101. Defendant argues that UIFSA makes a "distinction between 'establishment' proceedings versus 'modification' proceedings" that is "tied to the definition of 'obligor.' " Defendant points out that UIFSA defines "[o]bligor" as one who is actually or allegedly obligated to owe child support, N.C. Gen. Stat. § 52C-1-101(13), and argues that since Plaintiff was not

actually or allegedly obligated to Defendant for child support prior to the initiation of the Maryland action, the result is that Plaintiff was not an "[o]bligor" prior to that time whose obligation could be modified in a modification proceeding.

But Defendant does not cite to any authority for her contention that UIFSA employs an "obligor-focused approach[.]" As mentioned above, N.C. Gen. Stat. § 52C-2-204(a) describes when a "tribunal of this State may exercise jurisdiction to establish *a support order*[,]" not an obligation. N.C. Gen. Stat. § 52C-2-204(a) (emphasis added). And "[s]upport order" is expressly defined by UIFSA as "a judgment, decree, order, decision, or directive, whether temporary, final, or subject to modification, issued in a state or a foreign country for the benefit of a child, a spouse, or a former spouse, which provides for monetary support, health care, arrearages, retroactive support, or reimbursement for financial assistance provided to an individual obligee in place of child support." N.C. Gen. Stat. § 52C-1-101(21). That definition does not specify that a support order is confined to the obligations of one specific obligor, discrete from any obligations the obligee might owe to the obligor. On the contrary, that definition contemplates that a "[s]upport order" is an "order, . . . for the benefit of a child, . . . which [*inter alia*] provides for monetary support, . . . [and] arrearages," and specifically contemplates that such a support order can be "subject to modification." *Id.* Since the trial court entered an order first on 9 October 2015—which was most recently superseded on 28 June 2016—requiring Defendant to pay Plaintiff prospective child support and arrearages for the benefit of the parties' children, a support order had already been established prior to the trial court's 28 December 2017 order. We thus conclude that the 28 December 2017 order was a modification thereof rather than the establishment of a new child support order.

Our conclusion resonates with the purposes for which our legislature (and the legislatures of many of our sister states, including Maryland) enacted UIFSA:

> UIFSA was enacted to replace its predecessor, the Uniform Reciprocal Enforcement of Support Act ("URESA"). Under URESA, a state could assert jurisdiction to establish, vacate, or modify a child or spousal support obligation even when a similar obligation had been created in another jurisdiction. The result was often multiple, inconsistent obligations existing for the same obligor and injustice in that obligors could avoid their responsibility by moving to another jurisdiction and having their support obligations

> modified or even vacated. UIFSA creates a structure designed to correct this problem and provide for only one support order at a time.

Butler v. Butler, 152 N.C. App. 74, 78, 566 S.E.2d 707, 709-10 (2002) (internal quotation marks and citations omitted). And most on-point on the facts of this case, the official commentary to the UIFSA "Definitions" section (notably regarding the definition of "[o]bligor") states as follows, in part:

> The one-order system of UIFSA can succeed only if the respective obligations of support are adjusted as the physical possession of a child changes between parents or involves a third-party caretaker. *This must be accomplished in the context of modification, and not by the creation of multiple orders attempting to reflect each changing custody scenario.*

N.C. Gen. Stat. Ann. § 52C-1-101 official commentary (2015) (emphasis added). We accordingly conclude that the trial court did not err in exercising jurisdiction over the child support issue, and affirm the trial court's modification of its existing child support order.

Nonetheless, Plaintiff asks us to remand the 28 December 2017 order to the trial court for the addition of a conclusion that there has been a substantial change in circumstances. We do not believe that remand is necessary. While a child support order may only be modified "upon . . . a showing of changed circumstances," N.C. Gen. Stat. § 50-13.7(a) (2017), the lack of an express conclusion that such a showing has been made does not render such a modification deficient such that remand is required where the findings in the order reflect the showing of the changed circumstances. *See Davis v. Davis*, 229 N.C. App. 494, 503, 748 S.E.2d 594, 601 (2013) ("even if the 'magic words' are not used, the factual findings must still make the substantial change of circumstances and its effect upon the children clear").

In its 28 December 2017 order, the trial court found that the children had moved to Maryland to live with Defendant. The undisputed finding regarding the children's move reflects a substantial change of circumstances sufficient to support the modification of the support order under N.C. Gen. Stat. § 50-13.7(a). *See Shipman v. Shipman*, 357 N.C. 471, 479, 586 S.E.2d 250, 256 (2003) (reviewing the trial court's modification of a child custody order and noting that "the effects of the substantial changes in circumstances on the minor child . . . [were] self-evident, given the nature and cumulative effect of those changes as characterized

by the trial court in its findings of fact"). We accordingly decline to remand the 28 December 2017 order to the trial court.

Finally, Defendant's arguments concerning the 25 January 2018 order rest upon a conclusion that the 28 December 2017 order is void. As we decline to so conclude, and instead affirm the 28 December 2017 order, Defendant's arguments are unavailing, and we also affirm the 25 January 2018 order.

III. Conclusion

Because we conclude that the trial court's 28 December 2017 order was a modification of the trial court's existing child support order, we conclude that the trial court had subject matter jurisdiction over the child support issue and affirm both the 28 December 2017 and 25 January 2018 orders.

AFFIRMED.

Judges BRYANT and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 AUGUST 2019)

BACHE v. TIC-GULF COAST No. 18-788	N.C. Industrial Commission (X70584)	Affirmed
BENDER v. HORNBACK No. 18-1006	Rutherford (13CVD1247)	Dismissed in part; Affirmed in part.
GOSS v. SOLSTICE E., LLC No. 18-1158	Buncombe (18CVS218)	Affirmed
IN RE FORECLOSURE OF STEPHENS No. 18-1058	Wake (16SP2231)	Affirmed
IN RE K.W. No. 19-108	Mecklenburg (16JB410)	Vacated and Remanded
MARTIN v. THOTAKURA No. 18-1247	Forsyth (16CVS2701)	Affirmed
STATE v. BARNETT No. 18-831	Johnston (16CRS51059)	No Plain Error.
STATE v. HALL No. 18-1172	Rowan (16CRS54879)	Reversed
STATE v. HERNANDEZ No. 18-973	Pitt (15CRS58365) (15CRS712403)	Affirmed in Part and Reversed and Remanded in Part.
STATE v. McANINCH No. 18-852	Buncombe (17CRS84185)	No Error
SYSCO CHARLOTTE, LLC v. NAIK No. 18-1037	Cabarrus (18CVD463)	Affirmed in Part; Reversed in Part; Vacated and Remanded in Part
WEEKS v. WEEKS No. 18-1076	Nash (15CVD930)	Vacated and Remanded.

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